

No. 10169

4
Exhibits in
of Clerk.

9/13
United States
Circuit Court of Appeals

For the Ninth Circuit.

FOX WEST COAST AGENCY CORPORA-
TION, a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

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PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
Southern District of California
Central Division
No. 1649 (BH) O'C

JEAN L. FORSYTHE,

Plaintiff,

vs.

FOX WEST COAST AGENCY CORPORA-
TION, a corporation, et al.,

Defendants.

STATEMENT OF THE CASE PURSUANT TO
RULE 76 OF THE RULES OF CIVIL
PROCEDURE

This is an action at law for damages by reason
of personal injuries. It was commenced in the Su-

perior Court of the State of California, in and for the County of Los Angeles on December 20th, 1940. The parties to said action are: Jean L. Forsythe, plaintiff vs. Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe Ltd., a corporation, John Doe, Richard Roe and Jane Doe, defendants, as named in the original complaint when filed in said Superior Court. A copy of summons and complaint, while the action was pending in said Superior Court, was served upon the defendant Fox West Coast Agency Corporation, a [1*] corporation.

On June 18th, 1941, pursuant to the provisions of the Judicial Code in such cases made and provided, the above entitled action was, upon petition of defendant Fox West Coast Agency Corporation, a corporation, removed to the District Court of the United States, Southern District of California, Central Division.

On September 8th, 1941, pursuant to a motion made by the plaintiff at said time, an order was made granting the plaintiff leave to file an

AMENDED COMPLAINT.

Said amended complaint alleges in substance, in so far as the plaintiff and defendant Fox West Coast Agency Corporation, a corporation, are concerned, the requisite jurisdictional facts consisting of diversity of citizenship and amount of damages claimed.

*Page numbering appearing at foot of page of original certified Transcript of Record.

Said amended complaint, in addition to the jurisdictional requirements, alleges, in so far as the defendant Fox West Coast Agency Corporation, a corporation, is concerned, as follows (in substance):

The defendants, Fox West Coast Agency Corporation, a corporation, Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, now and at all times mentioned herein were engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater, which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said theater being located on South Broadway between Ninth and Tenth Streets in the City of Los Angeles, County of Los Angeles, State of California.

On the 24th day of March, 1940, plaintiff paid an admission to the defendants to enter the aforesaid United Artists Theater to view motion pictures and entertainment then and there being displayed by said defendants and that said defendants accepted said admission fee from said plaintiff and said plaintiff thereafter entered said theater; that after entering said theater plaintiff [2] proceeded to a seat among those provided for the patrons of said theater; that at said time and place, due to the careless and negligent manner in which the defendants, and each of them, maintained and operated the seats in the said theater, when plaintiff sat down upon said seat in said theater to view said

picture show as aforesaid, the seat collapsed causing her to be thrown violently to the side and down.

It is stipulated by the parties that if the plaintiff was legally entitled to recover a judgment against the Fox West Coast Agency Corporation, a corporation, she was entitled to judgment in the sum of \$2500.00. As no point is to be made in the Circuit Court of Appeals with reference to the nature and extent of the injuries sustained by the plaintiff or with reference to the amount of the damages sustained by the plaintiff if she was legally entitled to recover any judgment whatever, all reference to pleadings and evidence pertaining to the subject matter of damages will be omitted from this statement of the case.

Summons on the amended complaint was issued in the above entitled court on September 10th, 1941, and a copy of said summons and of the amended complaint was duly served upon the Fox West Coast Theatres Corporation, a corporation, on September 15th, 1941.

Within the time allowed by law the defendants Fox West Coast Agency Corporation, a corporation, and Fox West Coast Theatres Corporation, a corporation, filed and argued separate motions to dismiss the said amended complaint, specifying the following grounds, in each motion:

“(1) For an order dismissing the amended complaint as filed herein upon the ground that plaintiff has failed to state a claim upon which relief can be granted.

(2) A motion for a more definite statement of matter which is not averred with sufficient definiteness or particularity to enable the defendant properly to prepare its responsive pleading or [3] to prepare for trial.

That the defects complained of in the motion for a more definite statement of matter which is not averred with sufficient definiteness or particularity to enable the defendant to prepare its responsive pleading or to prepare for trial, are the following:

(a) The amended complaint alleges in paragraph VII: 'That at said time and place, due to the careless and negligent manner in which the defendants, and each of them, maintained and operated the seats in said theater * * * the said seat collapsed causing her to be thrown violently to the side and down,' and said allegation is a conclusion and opinion and is not the allegation of any specific **negligent act**.

The detail desired is the statement of the negligent act which the plaintiff claims was committed by this defendant with reference to either the maintenance or operation of the seats in the theater and also how or in what manner this defendant operated any seat in the said theater or how or in what manner any specific negligent act in the maintenance or operation of any seat caused the same to collapse."

The motions were and each thereof was denied and the defendants Fox West Coast Agency Corpo-

ration, a corporation and Fox West Coast Theatres Corporation, a corporation, filed a

JOINT ANSWER TO THE AMENDED
COMPLAINT,

within the time allowed by law.

The material substance of said answer to said amended complaint is as follows:

The defendants admit that the defendants Fox West Coast Theatres Corporation, a corporation, and United Artists Theater Circuit, Inc., a corporation, are now and at all times mentioned in the said amended complaint were engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater, which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said theater [4] being located on South Broadway, between Ninth and Tenth Streets, in the City of Los Angeles, County of Los Angeles, State of California.

Defendant Fox West Coast Agency Corporation, a corporation, denies that it was at any time mentioned in plaintiff's amended complaint engaged in the business of operating or maintaining a motion picture theater known as the United Artists Theater, said theater being located on South Broadway, between Ninth and Tenth Streets, in the City of Los Angeles, County of Los Angeles, State of California, and alleges in this behalf that it was merely an agent of the defendants Fox West Coast Theatres

Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation.

Said answering defendants admitted that on or about the 24th day of March, 1940, the plaintiff paid an admission to the defendants, other than the defendant Fox West Coast Agency Corporation, a corporation, *the* enter the United Artists Theater, to view the motion picture and entertainment then and there being displayed by defendants, other than defendant Fox West Coast Agency Corporation, a corporation, and that said defendants, other than the defendant Fox West Coast Agency Corporation, a corporation, accepted said admission fee from said plaintiff and said plaintiff thereafter entered said theater.

All of the defendants denied that they or any of them at any time operated any seat in said theater.

The defendant Fox West Coast Theatres Corporation, a corporation, denied that at any time or place it maintained any seat in a careless or negligent manner or that due to any carelessness or negligence in or about the maintenance of any seat in said theater, said or any seat collapsed or that plaintiff has been damaged as a proximate result of any carelessness or negligence in or about the maintenance or operation of any seat in said theater.

The answering defendants stated in their answer that they were and each thereof was without knowledge or information sufficient to [5] form a belief as to the truth of the averment that "when the

plaintiff sat down upon said seat in said theater to view said picture show as aforesaid, the said seat collapsed, causing her to be thrown violently to the side and down.”

The defendant Fox West Coast Agency Corporation, a corporation, denied that it at any time **main-**
tained or operated any seat in said theater.

The defendant Fox West Coast Theatres Corporation, a corporation, denied that it was negligent or careless in the maintenance or operation of any seat in said theater or that any negligence or carelessness in the maintenance or operation of any seat in said theater was the immediate or proximate or any cause of any injury received by the plaintiff.

Defendant Fox West Coast Theatres Corporation, a corporation, pleaded a defense predicated upon a claim that the plaintiff's cause of action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure of the State of California, and judgment in the above entitled court was, on this defense, rendered in favor of the said defendant Fox West Coast Theatres Corporation, a corporation.

No service of process was ever had upon the defendant United Artists Theatre Circuit, Inc., a corporation.

As a separate and special affirmative defense the defendant Fox West Coast Agency Corporation, a corporation, alleged that the plaintiff approached a seat in said theater where she intended to sit for the purpose of viewing a certain picture and that

the plaintiff negligently and carelessly failed to inspect or pay any attention to said seat or the condition thereof and negligently and carelessly failed to discover whether the same was or was not in good and sufficient condition and negligently and carelessly failed to ascertain or discover whether the same was or was not loose and negligently and carelessly failed to make any test whatever of [6] said seat and negligently and carelessly permitted her body to come in severe and unusual contact with the parts of said seat and negligently and carelessly caused the said seat to be subjected to an extraordinary and unusual strain and stress and negligently and carelessly forced a portion of her body between the arms of said seat in a manner in which the said seat was not designed to be used and negligently and carelessly caused an extraordinary and unusual strain and stress of the arms of said seat to the sides thereof and away from each side of the plaintiff's body and negligently and carelessly used the arms of said seat for a purpose for which they were not designed in that by forcing her body into the space existing between the arms of said seat, her said body being much wider than such space, she exerted a great and unusual force sidewise against each arm of said seat, at a time when she knew, or should have known, in the exercise of ordinary care, that the arms of said seat were designed solely for the purpose of separating the various occupants of the seats in the theater, one from the other, and for the purpose of arm rests, and the said plain-

tiff, at said time, was an unusually large and unusually heavy woman weighing approximately from 275 pounds to 300 pounds, and negligently and carelessly failed to take into consideration the fact that the seat was, and all of the seats in said theater were, designed to accommodate persons of average bulk and weight and negligently and carelessly failed to control her body and the manner in which she forced her body into said seat and as a proximate result of each of the foregoing, the plaintiff so spread, strained and misused the seat that the same, or some part thereof was caused to break while being used by the said plaintiff, as aforesaid, and if the plaintiff sustained any injury whatever, the same was a proximate result of said negligence and carelessness of the plaintiff, as aforesaid.

As a second and special affirmative defense the defendant Fox West Coast Agency Corporation, a corporation, alleged that at all [7] times mentioned in her amended complaint, the plaintiff was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew, or should have known, that seats in theaters and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theater was designed with the purpose of accommodating a person of the grossly excessive

weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in the United Artists Theater in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risks of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff.

The answer contained a prayer that the plaintiff take nothing by her said amended complaint and that the defendants have judgment for their costs incurred.

The amended complaint was a verified complaint and the joint answer filed by the defendants Fox West Coast Agency Corporation, a corporation, and Fox West Coast Theatres Corporation, a corporation, was likewise verified.

TESTIMONY

The case came on regularly for trial before the trial court sitting without a jury on February 12th, 1942 at 10 A. M.

The plaintiff

JEAN L. FORSYTHE

was the first witness called and sworn. After she had stated her name and the fact that she was the plaintiff in the action, the defendant Fox West Coast Agency Corporation, a corporation, objected to the introduction of any evidence "upon the ground that the amended complaint on file herein [8] fails to state a claim upon which relief can be granted for the reason that under the substantive law of the State of California, which is the only basis of any liability, the amended complaint does not state facts sufficient to predicate any relief thereon, and in particular the complaint fails to allege that there was any latent or hidden danger in or about the premises or that any latent or hidden danger was known to the defendant Fox West Coast Agency Corporation, a corporation, and not known to the plaintiff, and no allegation that, with the existence of a latent or hidden danger known to the defendant Fox West Coast Agency Corporation, there was any failure on the part of the said defendant to give any warning to the plaintiff.

"I realize that that point has been raised in a motion to dismiss, and the cases relied upon in the motion to dismiss are the same as the defendant relies upon now, particularly

(Testimony of Jean L. Forsythe.)

Harris v. Smith, 44 A. C. A. 759; Colombo v. Axelrod, 45 A. C. A. 515 and Papineau v. Distributors Packing Co. 10 Cal. App. (2d) 558.”

The court overruled the objection to the introduction of proof.

Omitting the testimony of the plaintiff with reference to her bodily injuries, pain and suffering, and special expenses incurred, in and about the treatment of her injuries and her loss of wages, she testified, in substance, as follows:

On March 24th, 1940, I visited the United Artists Theater in the City of Los Angeles. The theater is on South Broadway, between Ninth and Tenth Streets, on the west side of the street.

I purchased a ticket and entered the lobby of the theater. An usher took my ticket at the door and I proceeded with the rest of the patrons into the theater. I was not shown where to sit and I chose a seat about eighteen rows from the front of the theater and sat down in the second seat; I lowered the chair part first and as I sat down, the lights being on, the back right side of the seat [9] collapsed and threw me backward. In falling I grabbed the chair in front of me and I yelled, “Oh!”

It was stipulated that Plaintiff’s Exhibit No. 1 is a fair representation of the seating arrangement in the theater on March 24th, 1942.

A gentleman sitting in the seat in front of me and one immediately behind me, helped me up and

(Testimony of Jean L. Forsythe.)

I moved forward two rows and sat down in the second seat. At that time the lights had gone out and I sat there,—it might have been half an hour or so; I don't know the exact time.

I was then in pain and so uncomfortable I could not sit there and I got up and got an usherette who was standing in the foyer. The party I referred to as an usherette worked in the theater. She was right out in that foyer there, dressed in an old fashioned southern gown. The name of the picture being displayed at that time was "Gone With the Wind". All of the other girls were dressed in similar dresses to advertise the picture. They were standing around, looking pretty. I did not see them take any person to any part of the theater.

Then I talked to a gentleman in the office of the theater. I made a written report in the office of the theater and left it with some person in the theater. After I left the report with this gentleman I left the theater.

At the present time my weight is 250 pounds. At the time I entered the United Artists Theater on South Broadway my weight was 285 pounds. I don't know how you would classify firmness of flesh but I was in good health. My body was firm even though rather obese. It was not the flabby kind of fat that would give away at the poke of a finger. It was good hard flesh. I have lost considerable weight since the time of the accident and have also lost considerable in so far as actual measurements are concerned. My

(Testimony of Jean L. Forsythe.)

hips were bigger at the time I went into the theater than they are now. I have lost quite a bit of growth around the hips and around the abdomen, but I would not [10] not say that in so far as the circumference of my leg is concerned.

When I entered the theater the lights were on.

When I walked down the aisle for the purpose of finding a seat I did not count the rows. I tried to estimate the number of rows in the theater from the front row to the row in which I took my seat. I would not say that I counted them accurately. My statement that I was in the eighteenth row is merely an estimate. As I walked down the aisle and selected the place I wanted to sit I did not find another lady sitting in the seat next to the aisle; there was not anyone there when I walked in. I did not walk by any person in order to get to the seat that I occupied. There was no person occupying seat number one immediately adjacent to the aisle so far as I remember. I think my memory is definite on that.

As I walked down the aisle I had my purse and my coat in my hand. I had no bundles or packages. Maybe I did have a book. I was wearing my coat and I was carrying my purse. I could not say I took my coat off before I sat down. I don't remember whether I did or not. I don't think I did, because I don't remember putting it on to leave, so I probably just kept it on. That was a long dark blue coat of heavy wool.

As I entered the space between the two rows of seats the seat of the chair that I sat in was up. I walked to a place directly in front of the seat. that

(Testimony of Jean L. Forsythe.)

I intended to occupy before I touched any part of the seat. I believe I entered sidewise to lower the seat. There would not be any reason for me entering, facing the front, there was nobody sitting there. I entered walking toward the seat. The seat portion of number one chair immediately adjacent to the aisle, I believe, was up: so that there was no obstacle to my passage in front of seat number one in order to get to seat number two.

In entering the space between the two rows of seats I walked forward in what we will call a normal manner until I got immediately [11] opposite seat number two. The next thing I did was to lower the seat with my hand. I put one of my hands on top of the seat part and lowered it, pushed it down. I pushed all the way down. During that time I was still facing in the same direction in which I faced as I walked in between the two rows of seats. Then I turned around to face the front of the theater and sat down.

This was the first time I had been in that particular theater. That was not the first time I had ever seen seats of the same general type as I observed in that theater. I had, on other occasions, taken hold of the seat portion of such chairs to lower such portions. When I took hold of this particular seat it did not feel loose to me.

Not having in mind anything like that I would not know whether it felt to me as many others that I had theretofore felt, when I had taken hold of them.

(Testimony of Jean L. Forsythe.)

I didn't notice anything unusual with reference to the seat or with reference to its tightness or looseness at the time I took hold of it and lowered it.

I lowered the seat down as far as it would go before I changed the position of my body. I got it all the way down, still standing sidewise so far as the direction of the row of seats was concerned. If, at the time I was lowering the seat, I had been standing directly in front of the screen, a line extending the line from my right shoulder to my left shoulder would have gone to the screen and reached the screen approximately at a right angle.

If that chair there might be used to illustrate the point I stood approximately as you are standing now, while lowering the seat. In other words, the direction of my body from the right shoulder to the left shoulder might have been turned just a little bit more than your left shoulder, like that, very little more; practically at a right angle was the way I was standing. When I say practically at a right angle I mean practically at right angles [12] to the back of the chair itself and I remained in that position during all of the time that I was lowering the seat of the chair, for about two seconds, or the length of time it takes.

After I got the seat all the way down I then changed my position; I turned around to face the screen to sit down. I partly faced the screen before sitting down.

(Testimony of Jean L. Forsythe.)

In lowering myself into that seat my hips would come in contact with the arms.

I did not examine the chair or any part of it after I fell.

PLAINTIFF'S EXHIBIT No. 5

is a copy of an agreement entered into by and between the defendants Fox West Coast Agency Corporation, a corporation, Fox West Coast Theaters Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, (the contract also involves other entities, none of which is important or material to this case).

Said contract is as follows:

“This Agreement made and entered into this 20th day of September 1937, by and between Fox West Coast Theatres Corporation, a Delaware corporation (hereinafter referred to as ‘West Coast’), Grauman’s Greater Hollywood Theater, Inc., a California corporation (hereinafter referred to as ‘Grauman’s Greater Hollywood’), United West Coast Theatres Corporation, a California corporation (hereinafter referred to as ‘United West Coast’), United Artists Theatre Circuit, Inc., a Maryland corporation (hereinafter referred to as ‘United Artists Circuit’), United Artists Theatres of California, Ltd., a California corporation (hereinafter referred to as ‘United Artists’), Fox West Coast Agency Corporation, a Dela-

ware corporation (hereinafter referred to as 'Agency'), and United Artists Theatre Corporation of Los Angeles, a California corporation (hereinafter referred to as 'Los Angeles United Artists:') [13]

Witnesseth:

Whereas, West Coast is the sublessee of the Loew's State Theatre, Los Angeles, California, for a term ending at the close of business on August 31, 1945; Grauman's Greater Hollywood is the ground lessee of the Grauman's Chinese Theatre in Hollywood, California, for a term ending at the close of business on January 31, 2023; United West Coast is the sublessee of the Four Star Theatre located near the corner of Wilshire Boulevard and Mansfield Avenue, Los Angeles, California, for a term ending at the close of business on December 31, 1938, and which term will be extended so that it will expire on March 31, 1947; Los Angeles United Artists is the lessee of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on December 31, 1957; and United Artists is the sublessee of the United Artists Downtown Theatre at 933 South Broadway, Los Angeles, California, for a term ending at the close of business on March 31, 1947; and

Whereas, West Coast is the owner of thirty-three and one-third per cent. ($33\frac{1}{3}\%$) of the outstanding capital stock of Grauman's Greater Hollywood and is also the owner of all the outstanding Class 'A' stock of United West Coast; and

Whereas, United Artists Circuit is the owner, directly or indirectly, of sixty-six and two-thirds per cent. ($66\frac{2}{3}\%$) of the outstanding capital stock of Grauman's Greater Hollywood, is the owner of all of the outstanding capital stock of Los Angeles United Artists and is the owner of all of the outstanding stock of United Artists which owns all of the outstanding Class 'B' stock of United West Coast; and

Whereas, the parties hereto desire to consolidate the operation of the theatres above referred to under the sole management and direction of Agency: [14]

Now, Therefore, This Agreement Witnesseth:

That in consideration of the premises and of the sum of One Dollar (\$1.00) lawful money of the United States of America by each party to the other in hand paid, receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is hereby covenanted and agreed by and between the parties hereto, each in respect of its own covenants and agreements, and not in respect of the covenants and agreements of any of the others, as follows:

1. Grauman's Greater Hollywood, United West Coast, Los Angeles United Artists and United Artists, and West Coast, respectively, hereby surrender to and vest in Agency the management of the Chinese, Four Star, United Artists Downtown and Loew's State theatres (said four theatres being hereinafter sometimes collectively referred to as 'the theatres'), but excluding any so-called commercial or non-theatre portion, if any, of the theatres or of the buildings in which they are located. All furniture, fixtures, equipment and personal property located in the theatres and used or useful in the operation thereof, shall remain in the theatres subject to the control of Agency. Agency shall manage and operate the theatres for the joint benefit of the parties hereto, and as such manager or operator shall have, among other things, the sole right and authority, and obligation as agent for the other parties hereto, (a) to select, purchase, license, lease and/or book motion pictures to be exhibited in the theatres; (b) to employ the personnel which in the opinion of Agency may be necessary for the successful operation of the theatres, including a local manager for each of the theatres and one 'district manager' for all of the theatres; and (c) to keep all books of accounts and records pertaining to the operation of the theatres. Agency from time to time may change

the respective operating policies of the theatres or of any one or more of them to include or exclude stage shows or other similar attractions, provided the written [15] consents of West Coast and United Artists Circuit shall have first been obtained, and in the event that the operating policy of any theatre is so changed, Agency shall have the sole right and authority and obligation as agent for the other parties hereto, to select, procure, purchase, license, lease and/or book such stage shows or other attractions for exhibition in such theatre. Agency may also from time to time close and thereafter re-open any of the theatres provided the written consents of West Coast and United Artists Circuit shall have first been obtained and in such event the parties hereto shall use their best efforts to dispose of any motion pictures purchased, licensed and/or leased for exhibition in such theatre or theatres during the period that the same may be closed, if such motion pictures are not needed in connection with the operation of any of the other theatres, and the gain or loss resulting from such disposition of motion pictures shall be credited or charged, as the case may be, as operating income or expense.

2. For its services hereunder, Agency shall receive an amount equal to five and one-quarter per cent. ($5\frac{1}{4}\%$) of the gross income of the

theatres, which amount shall be paid to it as hereinafter in subdivision (a) of Section 3 provided. For the purposes of this agreement the term 'gross income' shall mean the sum of the gross theatre box office receipts, and all other receipts of whatsoever nature derived from the operation of the theatres, less the amount of theatre admission taxes imposed by any governmental authority having jurisdiction. The term 'gross income' shall not include any booking fees or agency charges based on and deducted from the salary of any performers in the theatres, or any of them, and it is understood and agreed that Agency, or any corporation subsidiary to or affiliated with it, may charge and retain such amounts from performers' salaries without accounting therefor to any of the parties hereto.

3. During the term of this agreement, Agency shall collect the [16] gross income of the theatres, and shall deposit the same in a separate bank account (hereinafter referred to as the 'Operating Account'), it being expressly understood and agreed that all funds in the Operating Account shall be held in trust for the joint benefit of West Coast and United Artists Circuit. From the funds so deposited, but only from such funds and not otherwise, Agency shall be obligated to pay the following:

(a) First, to Agency on Monday of each

week an amount equal to five and one-quarter per cent. ($5\frac{1}{4}\%$) of the gross income of the theatres (hereinabove in Paragraph 2 defined) during the preceding week, commencing July 1, 1937; it being understood and agreed that the payments to Agency shall be an amount equal to three per cent. (3%) of such gross income for all periods prior to July 1, 1937.

(b) Second, on the first day of each month, commencing April 1, 1937:

To United West Coast Nine Hundred Twenty-three Dollars and Twenty-five Cents (\$923.25) as rental for the Four Star Theatre;

To Grauman's Greater Hollywood Seven Thousand Two Hundred Ninety-one Dollars and Sixty-seven Cents (\$7,291.67) as rental for the Chinese Theatre;

To West Coast Thirteen Thousand Four Hundred Eighty-six Dollars and Eleven Cents (\$13,486.11) as rental for the Loew's State Theatre;

To United Artists Six Thousand Five Hundred Dollars (\$6,500.00) as rental for the United Artists Downtown Theatre.

(c) Third, all other operating expenses of the theatres, as and when the same shall be due. The term 'operating expenses' shall have the meaning ordinarily attributed to it in proper accounting practice applicable to the motion

picture theatre business, and shall include, without limiting the generality of the foregoing (and in addition to [17] the expenses referred to above in subdivisions (a) and (b) of this Section 3), film rentals, cost of stage shows and other attractions, if any, service charges and rent on sound equipment, charges for heat, water, gas, light and power, salaries and wages of persons employed in the operation of the theatres, including, without limitation, a local manager for each of the theatres and one district manager for all of the theatres (provided that the duties of said district manager shall be limited to the supervision, under the direction of Agency, of the management and operation of the theatres), social security taxes paid by the employer, cost of advertising, minor repairs, audits by independent certified public accountants, and premiums on public liability insurance, but shall specifically exclude allowances for depreciation and obsolescence and (except in the case of the Four Star Theatre) taxes and assessments and premiums on fire insurance. With respect to the Four Star Theatre there shall be included in the 'operating expenses' and paid to United West Coast from the operating account, such taxes and assessments and such premiums on fire insurance covering the building and equipment as the sublessee is required to pay with respect to

such theatre under the present sublease (and under any renewals or extensions thereof) between United Artists, as sublessor, and United West Coast, as sublessee, as and when such taxes and assessments and insurance premiums shall be due and payable by United West Coast. Taxes and assessments upon, and premiums on fire and earthquake insurance, if any, covering each of the theatres (except the Four Star Theatre) shall be paid by the party holding said theatre under lease or sublease as in the first preamble of these presents set forth.

(d) Fourth, expenditures deemed by Agency in its sole discretion necessary in the operation of the theatres, or any one or more of them, other than 'operating expenses', as such term is herein defined and other than services specifically excluded from the definition of 'operating expenses', hereinabove set forth, provided, [18] however, that the aggregate amount of such expenditures shall not exceed One Thousand Dollars (\$1,000.00) for any one theatre during any period of six (6) consecutive months without the written consent of West Coast and United Artists Circuit having first been obtained.

Except as provided in this subdivision (d) of this section no expense can be charged against any party without its consent for repairs, re-

newals or equipment to a theatre or theatres held by such party, and except as provided in this subdivision (d), no expenditures from the Operating Account for purposes other than those included in subdivisions (a), (b) and (c) of this section may be made without the written consent of West Coast and United Artists Circuit.

(e) The balance of gross income, if any, remaining after the payment, or provision for payment, all in accordance with proper accounting practice applicable to the motion picture theatre business, of the items listed in subdivisions (a), (b), (c) and (d) of this Section 3, shall be termed 'net profits', and such net profits shall be distributed by Agency within twenty (20) days after the close of the next current fiscal accounting quarter, and quarter-annually thereafter (or on such other dates and for such other periods as may be mutually agreed upon in writing by West Coast and United Artists Circuit) one-half thereof to West Coast and one-half thereof to United Artists Circuit.

4. In the event that during the period of this agreement United West Coast, as the sublessee of the Four Star Theatre, or Grauman's Greater Hollywood, as the ground lessee of the Chinese Theatre, or West Coast, as the sublessee of Loew's State Theatre, shall obtain a

reduction in the rental payable by it under the terms of its lease or sublease, the amount payable hereunder as rental for any such theatre shall be reduced for the period and in the amount of such rent reduction.

In the event that during the period of this agreement the total rent paid for the United Artists Downtown Theatre by Los Angeles [19] United Artists to Ninth and Broadway Building Co., or to its successors or assigns as lessor, shall be diminished or reduced to an amount less than Six Thousand Five Hundred Dollars (\$6,500.00) per month, whether by agreement or otherwise, the amount payable hereunder to United Artists as rental for said theatre, shall be reduced for the period and in the amount of such rent reduction.

5. Prior to the execution of this agreement, West Coast and United Artists Circuit have each deposited in the Operating Account hereinabove referred to, the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00) to be employed in the operation of the theatres. The funds so deposited in the Operating Account may be used in the making of any of the payments referred to in subdivisions (a), (b) and (c) of Section 3 and, to the extent herein provided, in the making of any of the payments referred to in subdivision (d) of Section 3. If at any time during the term of this agreement,

the Operating Account shall be depleted below the sum of Twenty-five Thousand Dollars (\$25,000.00) Agency shall forthwith notify West Coast and United Artists Circuit, of such fact and of the amount of such depletion, and within twenty (20) days after the giving of such notice, West Coast and United Artists Circuit shall each pay to Agency for deposit in the Operating Account fifty per cent. (50%) of the amount required to restore the amount on deposit in the Operating Account to the sum of Twenty-five Thousand Dollars (\$25,000.00), it being the intention that fifty per cent. (50%) of the losses, if any, incurred in the operation of the theatres, shall be borne by United Artists Circuit and fifty per cent. (50%) by West Coast.

6. During the term of this agreement, Agency as agent for the parties hereto, shall effect and maintain in full force and effect public liability insurance covering each of the theatres and the appurtenances thereto in the amount of Fifty Thousand Dollars (\$50,000.00) covering injuries to one person in any one accident and in the amount of Five Hundred Thousand Dollars (\$500,000.0) [20] covering injuries to more than one person in any one accident, such insurance to be for the benefit of Agency and the particular party hereto holding under lease or sublease the theatre covered by

insurance as their interests may appear. Agency shall be obligated to pay from the Operating Account, but not otherwise, the premiums payable upon such public liability insurance as and when such premiums shall be payable under the terms of said contracts of insurance. Anything hereinabove to the contrary notwithstanding, it is expressly understood and agreed (and the mutual obligation of West Coast and United Artists Circuit to bear fifty per cent. (50%) of the losses as above provided is expressly limited hereby) that the amount of any liabilities arising out of any accident or accidents to persons or property in excess of the amount of all public liability insurance available for the satisfaction of such liabilities, shall be borne and discharged solely by the particular party holding, under lease or sublease as in the first preamble of these presents set forth, the particular theatre in which such accident or accidents shall have occurred.

7. Within ten (10) days after the termination of this agreement, the amount, if any, remaining in the Operating Account after payment, or provision for payment, of all payments provided for in subdivisions (a), (b), (c) and (d) of Section 3 hereof shall be distributed to West Coast and United Artists Circuit, fifty per cent. (50%) to each (or as their respective

interests may appear in the event of the failure of either of said parties to make any payment or payments required to be made hereunder.)

8. It is understood and agreed that the provisions of this agreement become effective as of April 1, 1937, unless otherwise provided herein, and that the term of this agreement is from April 1, 1937 to March 31, 1947.

9. It is understood and agreed that this agreement may not be assigned by any of the parties hereto without the written consent [21] of all of the other parties, provided, however, that Agency may assign all of its rights, powers and privileges under this agreement to any corporation subsidiary to West Coast and organized and equipped to perform similar services, upon condition that such assignee shall assume and agree to perform all the obligations of Agency hereunder, and upon such assignment and assumption Agency shall be relieved from any further liability under this contract except, with respect to all the period prior to such assignment, to account for the gross income and the Operating Account. The term 'subsidiary' or 'subsidiary company' whenever used in this section means any corporation fifty per cent. (50%) or more of the outstanding capital stock of which having voting power is at the time owned by West Coast, or any parent company

of West Coast, either directly or through one or more intermediaries.

10. If at any time or times during the term of this agreement one of the theatres shall be destroyed or damaged to an extent rendering it unfit for use as a motion picture theatre, by fire, earthquake or other casualty, the monthly sum required to be paid on account of the rental for such theatre under the provisions of subdivision (b) of Section 3, shall not be required to be paid from and after the date of such destruction or damage; provided, however, that if such theatre shall be restored to its former condition during the term of this agreement, such monthly payments shall recommence as of the date such restoration is completed. The destruction of or any damage to any of the theatres (if less than all of the theatres) shall not otherwise affect this agreement or the obligations of the parties hereunder.

11. During the term of this agreement Agency shall render to West Coast and United Artists Circuit:

(a) Daily statements of box office receipts of each of the theatres.

(b) Weekly statements showing receipts, disbursements [22] and expenses of and for each of the theatres for the preceding week.

(c) Annual profit and loss statements with respect to the operations of the theatres, duly

certified by a reputable firm of Certified Public Accountants.

(d) Such other information with respect to the operation of the theatres as may reasonably be required by West Coast or United Artists Circuit.

It is understood and agreed that the dates of the rendering of the weekly and annual statements referred to in (b) and (c) above, and the particular weekly or annual periods respectively covered thereby, may correspond with the dates and periods of similar weekly and annual statements prepared by Agency in the usual course of its business for other theatres managed or supervised by it, appropriate adjustments being made to cover any portion of a week or of a year which may be unaccounted for by reason of the relation of such dates and periods to dates of the commencement and termination of this agreement.

12. The parties hereto acknowledge that the theatres referred to in this agreement have, since on or about November 14, 1934, been operated substantially in accordance with the provisions of this agreement except that the rentals paid for the various theatres have not been the rentals provided to be paid under the terms hereof. In this connection all the parties hereto acknowledge and agree:

First: That all rentals to be paid up to and including March 31, 1937 have been paid and that no party is entitled to any rentals on account of any period prior to April 1, 1937.

Second: That after the deduction of the rentals heretofore paid, and charges and expenses computed in accordance with the provisions of this agreement, [23] and particularly Section 3 hereof (except that the deduction representing the charges for the service of Agency as set forth in Section 3 (a) hereof shall be an amount equal to three per cent. (3%) of the gross income of the theatres up to and including June 30, 1937), West Coast and United Artists Circuit are each entitled to one-half of the net profits arising from the operation of such theatres and all of them from November 14, 1934, to April 1, 1937.

Third: In an event any dispute should arise between any of the parties hereto relating to any matter or thing in connection with the operation of the theatres or any of them since November 14, 1934, the provisions of this agreement shall be determinative and shall apply to such matter or thing with the same force and to the same extent as though this agreement had then been in operation.

13. In the event that at any time during the term of this agreement the Four Star Theatre shall not be used for the purpose of exhibiting

first-run motion picture productions, said Four Star Theatre may, at the election of West Coast, and upon ten (10) days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation of this agreement. After the effective date of such notice the operations of said Four Star Theatre shall revert to United West Coast; provided, however, that if thereafter at any time or from time to time said Four Star Theatre shall be used for the exhibition of first-run motion picture productions, the operation of such theatre may, at the election of United Artists Circuit, upon ten (10) days notice in writing to West Coast and United West Coast, be reincluded in this agreement during such period or periods as said theatre shall so be used, and may similarly from [24] time to time at the election of West Coast, upon ten days notice in writing to United Artists Circuit and United West Coast, be excluded from the operation hereof during such period or periods as it shall not be so used.

14. United Artists and United West Coast agree that prior to the expiration of the term of the sublease of the Four Star Theatre from United Artists to United West Coast, said sublease will be extended on the same terms and conditions as are now contained therein (provided, however, that such terms and conditions may be modified or changed in accordance with

any modifications or changes made of or in a certain agreement between West Coast and United Artists, dated September 1, 1933) so that it will expire March 31, 1947.

15. Reference is hereby made to that certain agreement executed in duplicate at Los Angeles, California, the first day of September, 1933, by and between said Fox West Coast Theatres Corporation, therein referred to as 'Fox' and said United Artists Theatres of California, Ltd., therein referred to as 'United' Anything herein to the contrary notwithstanding, this agreement may be terminated and declared to be of no further force or effect whatsoever at the option of either West Coast or United Artists Circuit upon any termination of said agreement dated September 1, 1933, or any extension or renewal thereof. Such option shall be exercised prior to the expiration of thirty (30) days from and after any termination of said agreement dated September 1, 1933, by notice in writing served upon all the other parties hereto. Said written notice shall specify the date upon which this agreement shall terminate, which termination date shall be not more than thirty (30) days from and after the date of such notice.

16. Nothing herein is intended or shall be construed so as to create a partnership between or among the parties hereto, or to make any

of the parties hereto a partner of any other or all of the remaining parties hereto. [25]

17. All notices, orders or demands of any kind which any party hereto may be required or may desire to serve on any other party hereto under the terms of this agreement may be served (as an alternative to personal service or delivery to such party) by mailing the same by registered United States mail, addressed as follows:

To Fox West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To Grauman's Greater Hollywood Theater, Inc., at 1501 Broadway, New York, New York.

To United West Coast Theatres Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Circuit, Inc., at 1501 Broadway, New York, N. Y.

To United Artists Theatres of California, Ltd., at 1609 West Washington Boulevard, Los Angeles, California.

To Fox West Coast Agency Corporation at 1609 West Washington Boulevard, Los Angeles, California.

To United Artists Theatre Corporation of Los Angeles at 1501 Broadway, New York, New York,

or such other place as the parties hereto may designate from time to time in writing. Service shall be deemed complete within seven (7) days after such mailing.

18. This agreement is made solely for the benefit of the parties hereto and shall not be construed to render Agency liable to any person, firm or corporation other than the parties hereto, nor to render Agency liable for the payments referred to in subdivisions (b) or (c) and (d) of Section 3 hereof, except as in said Section 3 provided, and except for the obligation of Agency to account for the gross income and the Operating Account. [26]

In Witness Whereof, the parties hereto have subscribed their respective corporate names and affixed their respective corporate seals by their officers thereunto duly authorized, all as of the day and year first above named.

(Seal) FOX WEST COAST THEA-
 TRES CORPORATION,

By W. C. NICKEL
 Vice President

Attest:

JOHN P. EDMUNDSON
Asst. Secretary

 GRAUMAN'S GREATER HOL-
 LYWOOD THEATER, INC.,
By JOSEPH M. SCHENCK
 President

Attest:

T. J. HEALY
Secretary

UNITED WEST COAST THE-
ATRES CORPORATION,
By CHARLES P. SKOURAS
President

Attest:

ALBERT W. LEEDS
Secretary

UNITED ARTISTS THEATRE
CIRCUIT, INC.,
By WM. P. PHILIPS
Vice-President

Attest:

BERTRAM S. NAYFACK
Secretary

(Seal) UNITED ARTISTS THEA-
TRES OF CALIFORNIA,
LTD.,
By JOSEPH M. SCHENCK
President

Attest:

LOU ANGER
Secretary

Fox West Coast Agency Corp.

(Seal) FOX WEST COAST AGENCY
 CORPORATION,
 By CHARLES P. SKOURAS
 President.

Attest:

ALBERT W. LEEDS
Secretary [27]

(Seal) UNITED ARTISTS THEATRE
 CORPORATION OF LOS
 ANGELES,
 By JOSEPH M. SCHENCK
 President

Attest:

BERTRAM S. NAYFACK
Secretary

State of New York

County of New York—ss.

On this 21 day of Sept., 1937, before me, Anne M. Murphy, a Notary Public in and for said County, personally appeared W. C. Nickel known to me to be the Vice President, and John P. Edmundson known to me to be the Asst. Secretary of Fox West Coast Theatres Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal the day and year in this certificate first above written.

[Seal] ANNE M. MURPHY

Notary Public. New York Co. Clerk's No. 290.

New York Register's No. 8-M-403. Term Expires March 30, 1938.

State of California

County of Los Angeles—ss.

On this 21st day of October, 1937, before me, J. B. Codd, a Notary Public in and for said County, personally appeared Joseph M. Schenck, known to me to be the President, and T. J. Healy, known to me to be the Secretary of Grauman's Greater Hollywood Theater, Inc., the corporation that executed the within instrument, known to [28] me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) J. B. CODD

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 26, 1937.

State of California

County of Los Angeles—ss.

On this 27th day of September, 1937, before me, Ann Friedlund, a Notary Public in and

for said County, personally appeared Charles P. Skouras, known to me to be the President, and Albert W. Leeds, known to me to be the Secretary of United West Coast Theatres Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) ANN FRIEDLUND

Notary Public in and for said County
and State.

State of New York
County of New York—ss.

On this 20th day of September, 1937, before me, Schuyler J. Wilson, a Notary Public in and for said County, personally appeared William P. Philips known to me to be the Vice President, and Bertram S. Nayfack, known to me to be the Secretary of [29] United Artists Theatre Circuit, Inc., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) SCHUYLER J. WILSON

Notary Public, New York Co. No. 196. Register's No. 8 W 300.

Commission expires March 30, 1938.

State of California

County of Los Angeles—ss.

On this 21st day of October, 1937, before me, J. B. Codd, a Notary Public in and for said County, personally appeared Joseph M. Schenck known to me to be the President and Lou Anger, known to me to be the Secretary of United Artists Theatres of California, Ltd., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) J. B. CODD

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 26, 1937.

State of California

County of Los Angeles—ss.

On this 27th day of September, 1937, before me, Ann Friedlund, a Notary Public in and for said County, personally appeared Charles P. Skouras, known to me to be the President and Albert W. Leeds, [30] known to me to be the Secretary of Fox West Coast Agency Corporation, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named and acknowledged to me that such corporation executed the same.

(Seal) ANN FRIEDLUND

My Commission Expires January 15, 1940.

State of New York

County of New York—ss.

On this 20th day of September, 1937, before me, Schuyler J. Wilson, a Notary Public in and for said County, personally appeared Joseph M. Schenck known to me to be the President and Bertram S. Nayfack, known to me to be the Secretary of United Artists Theatre Corporation of Los Angeles, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation within named

and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) SCHUYLER J. WILSON

Notary Public, New York Co. No. 196

Register's No. 8 W 300.

Commission expires March 30, 1938." [31]

It was stipulated that any duly qualified officer of either of the corporate defendants in this action, if called, would testify that the only agreement which was in existence as between Fox West Coast Theatres Corporation, a corporation, Grauman's Greater Hollywood Theater, Inc., United West Coast Theatres Corporation, United Artists Theatre Circuit, Inc., United Artists Theatres of California, Ltd., Fox West Coast Agency Corporation, and United Artists Theatre Corporation of Los Angeles, is the agreement marked Plaintiff's Exhibit No. 5 and that said agreement was in full force and effect and had not been terminated in March 1940 and that the United Artists Theater, referred to in the agreement is the same theater which has been described in the pleadings and in the evidence in this case.

The contract was thereupon offered in evidence by the plaintiff.

The defendants and each of them objected to the receipt of the contract in evidence or the introduction of the contract in evidence "upon the ground that the plaintiff is not a party to the contract, and that contractual relationships existing between other persons do not give any rise to any duty which either of the defendants may, under the law, owe to the plaintiff in this case, that duty only arising in the event that the plaintiff was an invitee of the defendants, or of a particular defendant. The plaintiff cannot predicate her right of action, which is *ex delicto*, upon the terms or provisions of any contract, and the contract gives the plaintiff no rights whatever as against either of the defendants. I therefore object to the introduction of the contract upon the following several grounds, not jointly:

First: The contract is not competent proof of any fact in this case.

Second: The contract is not material to any issue in this case. [32]

Third: The contract is not relevant to any issue in this case.

Fourth: The contract does not and cannot furnish the slightest solace or benefit to the plaintiff in this case, and does not prove or tend to prove the existence of any duty whatever towards the plaintiff, and does not prove or tend to prove whether the plaintiff was or was not an invitee of the defendants, or either of them."

Subject to the objections heretofore set forth with reference to the reception in evidence of the written contract, Plaintiff's Exhibit 5, together with the further objection that the contract is not proof of the relationship of invitor and invitee as between the Fox West Coast Agency Corporation and the plaintiff, and that the contract does not prove or is not competent for the purpose of proving the existence of any duty owed by the Fox West Coast Agency Corporation to the plaintiff, and that proof of a failure, if any, on the part of the Fox West Coast Agency Corporation to perform any duty or obligation it may have contracted to perform for the actual owners and operators of the United Artists Theatre at 933 South Broadway would not give the plaintiff any right of action for damages because of that breach, the defendants stipulated that the relationship in existence between the Fox West Coast Agency Corporation, a corporation, and the Fox West Coast Theatres Corporation, a corporation, was in accordance with the terms and provisions of the written contract, Plaintiff's Exhibit 5, with the reservation also that if the court overrules the general and specific objections heretofore shown to have been interposed, the evidence in the form of the contract should be restricted with reference to its effectiveness as evidence and received for the sole and exclusive purpose of showing what relationship, if any, was created by and between the Fox West Coast Agency Corporation and the Fox

West Coast Theatres Corporation, pursuant to the terms and provisions of the contract, and that the contract should be excluded in so far as it might be evidence of any duty owing by the defendant Fox West Coast Agency Corporation to the plain-

[33]

tiff, or any of the other matters which were the subject matters of the specific objections.

The trial court overruled the objections to the admission of said contract, Plaintiff's Exhibit 5, and denied the request of the defendants, and each of them, with reference to limiting the effect of the contract as evidence.

"Mr. Gallagher: May I inquire whether the Court, in overruling the objections to the admission of the contract, would also deny the request of the defendants, and each of them, with reference to limiting the effect of the contract as evidence? The defendants, your Honor, admit it for certain specific purposes only.

The Court: Well, I think that could only become material if the objections were made before a jury, because the Court will only consider evidence that is material to the issue before it in a trial of this kind and an examination of the law will disclose whether there are limitations which the Court should consider. I think it would be necessary to rule upon the request if we had a jury, but being before the Court I will rule on it as I have.

The Clerk: That will be Plaintiff's Exhibit No. 5.

Mr. Gallagher: May I point out, your Honor, that the defendants, and each of them, maintain that the ruling is just as important in a trial without a jury as in a trial before a jury, because there is no way to show in the record what portions of the contract the trial judge considers material to any particular point, or whether the trial judge took any portion of the contract as the basis of proof of the existence of some duty or obligation the breach of which entails a legal liability on the part of any defendant to the plaintiff, who is not a party to the contract, and that is why I respectfully requested an order limiting the proof so that the record would show what purpose the contract was being received for, and I submit that it is just as important to have that sort of a ruling in a trial before your

[34]

Honor, since you now constitute the jury as well as the judge, as it would be if we had a jury.

The Court: I have not read this contract and I don't know what the limitations are. I have just admitted it in evidence. Now counsel is asking me to construe a contract which I have not read.

Mr. Gallagher: Well, I am very sorry if your Honor received that impression from what

I have said. I have asked that the contract be restricted to certain matters of proof, and I have asked the court to limit the contract itself so that no part or portion of the contract can be resorted to for the purpose of determining that there was any duty owing by the Fox West Coast Agency to this plaintiff, or that she was an invitee of the Fox West Coast Agency Corporation, or that any agreement which the Fox West Coast Agency Corporation may have assumed so far as the Fox West Coast Theatres Corporation is concerned, if breached, would permit this plaintiff to prosecute the Fox West Coast Agency Corporation for damages.

The Court: Well, if that is your only point, I thought I made it very clear when I stated that the plaintiff in this action cannot recover against any defendant in the action because of contractual relations that existed between those defendants. In other words, they can neither avoid nor give the plaintiff a cause of action against them if that cause of action did not exist in the absence of the contract. Now, let me make it clear again: I hold that both the principal and the agent who had charge, if it is shown that he had charge of the theatre and managed the theatre for the owner, and did it in a negligent manner—I hold that both the agent and principal can be sued as joint tortfeasors. That is where you and I disagree, Mr.

Gallagher. Now, with that in mind, the contract is admitted in evidence. I have no evidence before me as to just what the Fox West Coast Agency was in this picture.

Now, I would like to look at this contract, and you may be able to point out to me, Mr. Rountree, what this Plaintiff's Exhibit No. 5

[35]

shows, or you claim, with reference to this Fox West Coast Agency Corporation.

Mr. Rountree: I claim it shows that the other defendant corporations, together with other interested parties, surrendered to the Fox West Coast Agency Corporation full control and management of the theatre; that by its terms it handled the employees; it was the concern which employed the various members of the staffs of the theatres; that it selected the theatres. In other words, by the terms of this agreement, the Agency Corporation became the operating agency; that it was the organization which actually carried on the operation of the theatre, for which it received a percentage of the gross profits, and it also handled the distribution of income of the theatre. There may be some portions of that underlined in pencil, which was done by myself at another time.

The Court: (After reading the contract) You may proceed, gentlemen."

On June 4th, 1940, the plaintiff commenced a prior action in the Superior Court of the State of California, in and for the County of Los Angeles, numbered amongst the files of said court 452891 and named as defendants the following: "Fox West Coast Agency Corporation, a corporation, John Doe Company, a corporation, Richard Roe, Ltd., a corporation, John Doe and Jane Doe. Only the defendant Fox West Coast Agency Corporation, a corporation, was served with summons and complaint in said action number 452891. Said defendant Fox West Coast Agency Corporation, a corporation, filed an answer to said complaint in the said Superior Court of the State of California, in and for the County of Los Angeles, on or about June 28th, 1940.

A copy of said complaint in Superior Court action No. 452891 was received by the trial court in the case at bar, in evidence as Plaintiff's Exhibit No. 6 and a copy of the answer of the defendant Fox

[36]

West Coast Agency Corporation, a corporation, in said action bearing Superior Court No. 452891, was received by the trial court in the case at bar in evidence as Plaintiff's Exhibit No. 7.

Each exhibit was received over the objections of the defendant Fox West Coast Agency Corporation, a corporation, and the proceedings showing what occurred at the time the said complaint and answer were offered and received in evidence are as follows:

“Mr. Rountree: At this time, if the Court please, we will offer the complaint and answer which have heretofore been referred to, and portions thereof introduced by the defendants, in that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Jean L. Forsythe, plaintiff, vs. Fox West Coast Agency Corporation, et al., and bearing No. 452891.

Mr. Gallagher: To that offer the defendants desire to make general objections and specific objections. The general objections are:

First: That the offered evidence is not competent for proof of any fact or issue raised by the pleadings in the case now being tried.

Second: Said offered evidence is not material for proof of any fact or material to any issue of fact raised by the pleadings in the action now being tried.

Third: Upon the ground that the offered evidence, to wit, the complaint and the answer in the action numbered 452891, are not relevant to any issue made by the pleadings in the case at bar.

Specifically and severally, I object to the offer of the plaintiff's complaint in said action upon the following grounds:

First: The document is a self-serving declaration of the plaintiff and is not competent for proof of any of the issues of fact raised in

the pleadings in the case at bar with reference to any alleged tort liability. In other words, the defendants object to this complaint, in addition to the foregoing grounds, upon the [37]

ground that the allegations of the complaint are not competent proof of the existence of any relationship whatever as between the plaintiff and either of the defendants, or the existence of any duty between plaintiff and either of the defendants, or the breach of any assumed duty which may have existed on the part of the defendants, or either of them, towards the plaintiff, or with reference to any proximate causal connection between any alleged negligence and any injury sustained by the plaintiff, or with reference to proof of any damage sustained by the plaintiff as a proximate result of any actionable negligence, on the part of the defendants, or either of them.

Now, I desire to make a specific objection to each paragraph of the complaint as offered.

The defendants, and each of them, object to the offer of Paragraph I of the complaint upon each and all of the grounds heretofore specified, and upon the general ground that said paragraph is evidence which is incompetent, and upon the several and distinct grounds not stated in the conjunctive that it is also immaterial and is also irrelevant.

The defendants, and each of them, object to the allegations, and each and every element thereof, contained in the allegations of Paragraph II, upon each and every ground stated hereinbefore, such statement of each ground to be considered as a several and distinct objection made upon each of said grounds.

With reference to the allegations in the third paragraph, the same objections and each thereof are repeated.

With reference to the fourth paragraph, the same objections and each thereof, are repeated, and by repetition I mean to re-urge the same and each thereof to the allegations of both paragraphs III and IV.

With reference to the allegations of Paragraph V, the same objections and each thereof are repeated and re-urged with reference to the allegations and each and every separate or distinct element contained therein. [38]

With reference to the allegations in Paragraph VI, the defendants, and each of them, repeat and re-urge each and every objection heretofore made with reference to this offered evidence.

With reference to Paragraph VII of the complaint, the defendants, and each of them, repeat and re-urge each and every objection heretofore mentioned upon the same grounds severally as have been urged to the foregoing paragraphs.

With reference to the prayer of the complaint, the defendants, and each of them, make the same objections, and each thereof, and re-urge the same, and each thereof.

With reference to the verification to the complaint, the defendants repeat and re-urge each of the objections as hereinbefore specified to the offer of the complaint, or any specific paragraph thereof.

The defendants, and each of them, object to the offer of the answer of Fox West Coast Agency Corporation upon the following grounds:

First: The answer is not substantive proof of any fact or circumstance in issue in the case now being tried before this honorable court.

Second: The answer is not competent evidence of any fact.

Third: The answer is not material.

Fourth: The answer is not relevant.

I also specifically urge, as additional grounds of objection to the introduction of these pleadings, the proposition that pleadings in a prior action, or in the action now being tried by your Honor, are not to be received as evidence of any of the matters therein contained. By that I mean as substantive evidence of any such matters.

Now, so far as the defendant Fox West Coast Theatres Corporation is concerned, it

makes and reserves a separate and distinct objection from those in which it has joined with its co-defendant, Fox West Coast Agency Corporation, for the reason that these pleadings were not, and none of them was ever at any time served upon the Fox West Coast Theatres Corporation, and the Fox West Coast Theatres Corporation filed no pleading whatever in said action, and no matter stated in the answer of Fox West Coast Agency Corporation and no matter omitted from the answer of the Fox West Coast Agency Corporation in that action, is, in the slightest degree, binding upon the Fox West Coast Theatres Corporation.

Now, with specific reference to the allegations in the answer, the defendants, and each of them, object to the introduction of the allegations contained in Paragraph I upon each and every ground which has been specified hereinabove in the objections to the offer of the complaint, and the same objections are made, and each thereof is made, to the offer of the allegations of Paragraph II of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations of Paragraph III of the answer.

The same objections, and each thereof, are made and re-urged to the offer of the allegations contained under the heading of "As and for a first separate and special defense."

The same objections, and each thereof, are made to the offer of the allegations, contained in the paragraph headed "As and for a second separate and special defense", set forth in said answer.

The same objections, and each thereof, are re-urged to the prayer of said answer, and the same objections, and each thereof, are repeated and re-urged to the verification of said answer.

The Court: I will hear you.

(Argument of counsel.)

The Court: Objections overruled.

Mr. Gallagher: Might I ask, your Honor, for the record, whether the Court is admitting the complaint and the answer as substantive

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evidence for all purposes with reference to each and every issue of fact raised by the pleadings, or whether the Court is admitting this complaint and answer for some specific purpose?

The Court: I am admitting them, as I will state again, so that the record will be clear, and so that counsel will be protected if there is any error in the ruling—I am admitting them the same as if the plaintiff in this action had written a letter containing these statements to the defendants, or the same parties, or the defendant represented by Mr. Bertero in the present action, and if that defendant had written a letter to the plaintiff making the denials and admissions: the same as if it were in the form of

correspondence. I don't know that I can make it any clearer.

Mr. Gallagher: Well, then, I assume, from what your Honor has said, that the Court is admitting this evidence for the sole and exclusive purpose of a declaration against interest, or an admission on the part of the Fox West Coast Theatres Corporation, and not for any purpose other than that, and I ask the Court to so limit the effect of the evidence without waiving the objections, or any of them, that have been made.

The Court: That is correct. Proceed.'

BAYARD R. ROUNTREE,

produced as a witness on behalf of plaintiff, testified as follows:

“Direct Examination

Q. By Mr. Emme: What is your profession or occupation?

A. Attorney at law.

Q. Are you associated with any law firm at this time?

A. The firm of Rosecrans and Emme.

Q. And you were associated during all of the year 1940 and up to the present time?

A. That is right.

Q. Do you know Mr. Bertero, the secretary of the Fox West Coast Agency Corporation?

(Testimony of Bayard R. Rountree.)

A. I think he is assistant secretary. Yes; I met him about the 11th or 12th of June, 1941.

Q. Where did you meet him?

A. In the office of that concern at the corner of Vermont and Washington, as I recall the address.

Q. Did you have a conversation with Mr. Bertero in reference to the operation of the United Artists Theatre on South Broadway in the City of Los Angeles?

Mr. Gallagher: That is objected to on two grounds. First, it calls for hearsay, and second, it calls for a conclusion of the witness based on hearsay, and it would not be competent for any fact in this case. The mere fact that a man is secretary of a corporation does not clothe him with the right to make declarations with reference to past events, or have any conversation which would have the effect of establishing substantive proof of the existence of past events or past conditions.

The Court: The objection is premature, because the only question was: 'Did you have a conversation?'

Mr. Gallagher: With reference to certain things.

The Court: Yes; he can say yes or no to that. Is not that the answer to it? He has not asked him more than that. Read him the question.

(Question read by the reporter.)

(Testimony of Bayard R. Rountree.)

The Court: 'Yes' or 'No.'

A. Yes.

Q. By Mr. Emme: Where did this conversation take place?

A. In the office of the Fox West Coast Agency Corporation. I believe there are several names on the door, but I know that is one of them. That is the corporate name that is on the door.

Q. Did you discuss his answer in the case on file, No. 452891, and also the case on trial in this department?

The Court: 'Yes' or 'No'. [42]

A. Yes; I did. That is, at that time I discussed the answer in the first case and the answer in the Superior Court. Not the answer that is filed to the amended complaint in this court.

Mr. Gallagher: I move to strike out the answer of the witness on the ground, that in effect, it is stating hearsay, and there is no evidence proving or tending to prove that Mr. Bertero had any authority whatever to speak for or on behalf of either defendant in this case with reference to any fact in issue in the case now being tried. The evidence must prove that whatever statement was made was made in the course and scope of some actual authority. The mere fact that a man is secretary of a corporation does not give him the right to go out, or

(Testimony of Bayard R. Rountree.)

even in his office, and have conversations with somebody with reference to some past event.

Q. By the Court: As I understand it, this is the same individual who signed and verified the answers to the complaints in this action?

A. That is right.

The Court: Do I understand that counsel repudiates his authority to verify those answers, and that the verifications are false oaths of the secretary? Is that my understanding?

Mr. Gallagher: No, no, your Honor.

The Court: I understood you to say he could not speak for the corporation. If he could not speak for the corporation, then he has made false oaths in verifying these answers.

Mr. Gallagher: Not at all.

The Court: Or he can only speak when it is in the interest of the corporation but he must be silent when anything comes out of his mouth that is unfavorable to the corporation; is that correct?

Mr. Gallagher: No; that is not what I contend at all.

The Court: All right. Let us have it.

Mr. Gallagher: What I contend is there is no evidence proving or tending to prove that Mr. Bertero was authorized to speak to Mr.

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Rountree with reference to any answer which may have been filed or which was going to be

(Testimony of Bayard R. Rountree.)

filed in any lawsuit. Furthermore, there is no evidence proving or tending to prove that Mr. Bertero was authorized by either corporation to have any conversation with Mr. Rountree about what had happened at the theatre on March 24, 1940, or at any other time, or at all, and I submit that that has nothing to do with his verification of their answer.

The Court: In other words, your position is that an officer of the corporation can verify an answer, but he cannot be inquired of with reference to his verification of the particular answer in that particular action. Now, he was either authorized to verify the answer or he was not.

Mr. Gallagher: Certainly, he was authorized to verify the answer.

The Court: But you cannot inquire of that man who verified the facts in that answer as to anything about the facts in the answer or connected with that transaction?

Mr. Gallagher: Yes. He is not here as a witness, you understand."

“Direct Examination (Resumed)

Mr. Emme: Will you read the last question and answer, please.

(Last question and answer read by the reporter, together with motion to strike.)

The Court: The motion is overruled.

(Testimony of Bayard R. Rountree.)

Q. By Mr. Emme: By referring to the case in the Superior Court, you were referring to the case pending in the Superior Court, No. 459395, and case No. 452891, in the Superior Court of Los Angeles County?

A. That is correct.

Mr. Gallagher: If your Honor please, for the purpose of avoiding the renewal of objections which were made with reference to the

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testimony of this witness in regard to conversations with Mr. Bertero, I wonder if counsel is willing to stipulate, if it is satisfactory to your Honor, that all of this line of testimony having to do with conversations with Mr. Bertero shall be deemed to have been objected to upon each and every ground stated during the testimony of Mr. Rountree with the same force and effect as though restated verbatim?

Mr. Emme: Yes.

The Court: It will be so understood.

Q. By Mr. Emme: And the Mr. Bertero that you had this conversation with is the same Mr. Bertero who verified the answers as assistant secretary of the Fox West Coast Agency?

A. Yes.

Q. What was the conversation?

A. I told Mr. Bertero the occasion for coming out was the fact that in the first answer

(Testimony of Bayard R. Rountree.)

they had filed they had admitted the allegations of the operation of the theatre, and in the second answer they had denied it. He said, 'Yes; in the first case, as I recall, we simply did not deny the allegation.' He said, 'I am a lawyer, so I know that in effect we admitted it.' I asked him how it happened that there was a denial in the second answer. He said, 'Well, I objected strenuously to verifying the answer with the denial, but it was a matter of interpretation of the term 'operation' and upon the insistence of Mr. Gallagher that he was entitled to verify it with the denial in there, he had verified it. I said, 'Well, what is the situation with reference to the operation of the theatre?' He said, 'Well, the theatre—' that is, the downtown theatre, we had identified the particular theatre—the United Artists downtown theatre—'is operated under the terms of a contract,' and he either had the contract on his desk or sent for it and at that time showed me the contract and particularly turned to the first numbered paragraph of the contract starting on page 2 of the contract. [45]

Q. I notice you are now looking at a document. Is that Plaintiff's Exhibit No. 5 in this proceeding?

A. Plaintiff's Exhibit No. 5, yes.

Q. Is that the document he showed you at that time?

(Testimony of Bayard R. Rountree.)

A. Well, this is a photostat of the document. I believe it was the original contract that he showed me at that time. As I recall it, it was a bound volume, but it was the same document. We had some conversation about the terms as set out there in that first paragraph.

Q. By the Court: On page 2?

A. On pages 2 and 3. The paragraph starts at the bottom of page 2. It covers all of page 3 and part at the top of page 4. We also discussed Paragraph 2, which provides that the agency should receive 5.25 per cent of the gross income of the theatres. I said, 'Well, you are operating under that contract? That is, you are conducting the theatres?' He said, 'Yes, in accordance with the terms of the contract there set out. That is the thing that is being carried out, and was at the time the accident happened.' I think he called my attention to the fact that the contract was executed in 1937. I asked him if the Agency Corporation paid the employees. He said, 'The funds are put in what they call an operation or account—that is, the income of the theatre—'and the funds are distributed from that by the Agency Corporation'; the employees were paid from that fund and the agency itself got a percentage from that fund and the other two or three corporations—he designated them; there are

(Testimony of Bayard R. Rountree.)

several corporations named here; I always have difficulty in remembering which is which.

Mr. Gallagher: May I have the last part of the answer read?

(Last part of the answer read by the reporter, beginning 'he designated them.')

Q. By Mr. Gallagher: That is, you or Mr. Bertero? [46]

A. No. I was merely trying to identify the corporations' names with accuracy. I will say that I recall specifically the two corporations other than the West Coast Agency Corporation which are the other parties named in this case. I think I asked him if they selected the pictures, if the Fox West Coast Agency Corporation selected the pictures, and he said, 'Yes; they are on a booking arrangement of some kind,' and we did go into detailed discussion as to how the pictures were booked.

Q. By Mr. Emme: Did you have any further conversation with him?

A. You mean on that day?

Q. Yes.

A. Yes; there was some other conversation. I don't know as I can recall it all. I know he told me that he was busy, very busy, and did not like to have to take time out to have his deposition taken, and was very glad to give me any information we could get by taking his deposition. I think we had some conversation

(Testimony of Bayard R. Rountree.)

about obtaining a copy of the contract at that time, Mr. Bertero was supplying us with a copy of the contract. I am not quite sure whether that was that day or in a telephone conversation a day or two later.

Q. Did you have a telephone conversation with him a day or two later?

A. Yes.

Q. Did you recognize his voice on the phone?

A. Yes.

Q. What was the conversation?

A. I told Mr. Bertero that Mr. Gallagher and myself had been unable to reach a stipulation as to certain facts, and we would like to get a copy of the contract. If I recall correctly, at the time—I think that was the next day after the conversation at the office.

Q. Well, these conversations all took place in the early part of June, 1941? [47]

A. If you will let me have the file to refresh my memory I think I can answer. I am quite sure the first conversation took place on either the afternoon of the 11th of June or the morning of the 12th of June, because I prepared a stipulation after the conversation with Mr. Bertero, and that was done on the 12th of June.

Q. Of what year?

A. Of 1941. The 12th of June, 1941. I am quite sure that I talked to Mr. Bertero on the

(Testimony of Bayard R. Rountree.)

morning of June 13th, because I recall going to Mr. Gallagher's office late in the afternoon on the 12th and not leaving there until after five o'clock, so it was the next morning that I called Mr. Bertero on the phone.

Q. What conversation did you have with him on the telephone?

A. At that time, on the phone, I recall that he said that he would be glad to let us have the copy, but I think he told me at that time that their photostat equipment had not arrived from the East, and I asked him if I could bring a stenographer out to make a copy and he told me that I could. That was the extent of that telephone conversation.

Mr. Emme: You may cross-examine.

Mr. Gallagher: In view of the fact that the defendants made the objection to this testimony which were made, and solely for that reason, I will not cross-examine."

(Rep. Tr. pg. 94, line 24 to pg. 100, line 11).

JOHN B. BERTERO,

called by the plaintiff for the purpose of cross examination, testified as follows:

I am and in March 1940 was an attorney at law and also a director and officer of the Fox West Coast Agency Corporation, a corporation, and of Fox West Coast Theatres Corporation. Plaintiff's

(Testimony of John B. Bertero.)

Exhibit No. 5 is a photostatic copy of a contract in force on March 24th, 1940. The method set out therein was carried out at that time by the corporations enumerated therein, to the best of my knowledge. [48]

“Q. By Mr. Emme: Will you state the conversation you had with Mr. Rountree in the early part of June, 1941?

Mr. Gallagher: Objected to on the ground it is immaterial and not competent as proof in this case, no foundation laid, no showing of the authority of the witness at that time to have any conversation with Mr. Rountree with reference to any past event or with reference to any condition which may have existed in the past.

The Court: I think you better lay the foundation in the face of an objection of that kind. The witness has testified as to his authority and position at this time, but there is no evidence as to his authority or position in 1941.

Mr. Gallagher: I will stipulate that he was assistant secretary of the corporation at the time the conversation occurred. The objection is based on this proposition: That there is no proof that Mr. Rountree and Mr. Bertero were discussing any business transaction in which the Fox West Coast Agency was interested, or that they were discussing any matter within the scope of Mr. Bertero's authority as assistant secretary of the corporation.

(Testimony of John B. Bertero.)

The Court: Of course, I cannot pass on that until I know what he is going to say.

Mr. Gallagher: And it is an attempt to vary the terms and provisions of a written instrument, to wit, Plaintiff's Exhibit No. 5, which is plaintiff's evidence produced here.

The Court: That is not the subject of the litigation here. That is merely an exhibit, so that the rule of evidence with reference to varying a written instrument would not apply.

Q. By the Court: On March 24, 1940, just what were your official connections with the various corporations?

A. I was assistant secretary of Fox West Coast Agency Corporation and a director of that corporation.

Q. By Mr. Gallagher: Will you please talk a little louder? [49]

A. I was assistant secretary of Fox West Coast Agency Corporation and a director of that corporation, and also of Fox West Coast Theatres Corporation and I was a director of both corporations.

Q. By the Court: What office did you hold with the Fox West Coast Theatres Corporation?

A. Assistant secretary and also a director.

Q. Of both?

A. Of both.

(Testimony of John B. Bertero.)

Q. Of both the Fox West Coast Agency and the Fox West Coast Theatres Corporation?

A. Yes.

Q. Was there anyone else present at the time of this conversation in June, 1941?

A. No one, with the possible exception of a file clerk or my secretary may have entered my office while Mr. Rountree was there.

Mr. Gallagher: It is very difficult to hear you?

The Court: Will you read that answer, Mr. Reporter?

(Answer read by the reporter.)

The Court: Objection overruled. Proceed.

A. By Mr. Emme: What was the conversation had with Mr. Rountree?

A. I had been served with a subpoena to take my deposition as an officer of Fox West Coast Agency Corporation, I believe, in the middle of June, and it is my personal recollection that I phoned Mr. Emme and asked him to spare me the time and annoyance attending a formal deposition; that our company was quite willing to give whatever information they desired at an informal conference between myself and Mr. Emme. Subsequently I wrote a letter expressing the same thought, and Mr. Rountree, upon appointment, came to my office to make such inquiries as he might deem proper, and Mr. Rountree asked concerning who op-

(Testimony of John B. Bertero.)

erated the United Artists Theatre in Los Angeles, and I told him it was operated subject to an agreement between certain parties, and

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I showed him the original agreement and permitted him to inspect it.

Q. Did you enumerate those parties at that time?

A. I showed him the original contract, of which Exhibit No. 5 is a photostatic copy. We had some conversation about just what capacity or services Fox West Coast Agency Corporation was performing, and we did discuss the question whether it was operating the theatre. I told him that Mr. Gallagher had expressed to me the legal theory that Fox West Coast Agency Corporation was not the operator of the theatre, and we talked about that point, about lawyers differing on the interpretation of words. Then, as I recall, I offered to supply Mr. Rountree with a copy, and subsequently he called me on the telephone and, as he narrated—I have no independent recollection of the conversation, but all in all—well, pardon me. I have no further recollection of the conference.

Q. Did you definitely discuss the answers that had been filed in the first case and the second case?

A. I am quite sure we did.

Q. Didn't you tell him that you did object

(Testimony of John B. Bertero.)

to verifying the second answer in the form it was in?

A. I don't know that I used the word 'object.' I did tell him I had had a conversation with Mr. Gallagher about the propriety of verifying the answer concerning the word 'operating' or 'operator,' or some such use of that term.

Q. Did you discuss what percentage of the proceeds from the theatre went into the Fox West Coast Agency Corporation?

A. Well, we had the contract before us, and undoubtedly we had reference to the contract to show the provisions of the contract.

Q. Did you inform him that that was being carried out?

A. Yes; I did.

Q. And it was being carried out, was it?

A. Yes; to the best of my knowledge. [51]

Q. At that time, in 1940?

A. Yes. Well, no; the conversation took place in 1941.

Q. I beg your pardon. That is right. The terms of the contract were being carried out on March 24, 1940?

A. To the best of my knowledge.

Mr. Gallagher: Just a minute. I thought there was more to the question. I object to the question on the ground it calls for a conclusion and opinion of the witness and that no

(Testimony of John B. Bertero.)

proper foundation is laid to show that he was down there at the theatre.

The Court: That is right. I will sustain the objection. The question will have to be put in another form. That calls for a conclusion of the witness.

Q. By Mr. Emme: What was being done at that time?

Mr. Gallagher: We object to that on the ground it is ambiguous.

The Court: What was the question?

(Last question read by the reporter.)

Mr. Gallagher: If counsel wants to know the fact as to who paid the money, whose employees they were, who employed the manager and the janitors, paid them off, I have no objection; as a matter of fact, I have the documentary evidence here to show those facts, who paid the social security tax and who paid the unemployment benefit taxes, and where the money came from that paid these men, and where they were paid. I have no objection to the fact, but I object to these conclusions that are called for.

The Court: Yes; that calls for a conclusion.

Q. By the Court: Just what did you have to do with the United Artists Theatre? Did you have any connection with it? Did you go down there at all?

A. I never visited the theatres, your Honor, but I signed the checks. I know they had a

(Testimony of John B. Bertero.)

separate established bank account for the four theatres and I know, as a director of Fox West Coast Theatres Corporation, the amount of income that they derived from each picture, and

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I kept acquainted from time to time with what pictures were being shown at the theatre and had discussions as to whether the pictures were paying well or poorly.

Q. Well, Mr. Bertero, do you stay there in person? You have that information, but you don't say what official connection you have. Do you give any directions in your capacity as secretary? Do you have anything to do at all with the theatre?

A. Well, your Honor, I sign the checks on the funds. Does that answer part of your Honor's question?

Q. Is that all you do?

A. I sign checks; I consult with the theatre managers; they bring problems to me, and I would give them advice on their problems, and other than keeping acquainted with the problems connected with the theatres, I issued no orders, had no authority to direct the management of the theatres.

Q. Who had that authority?

A. That rested in Mr. Charles Skouras.

Q. By Mr. Emme: What connection has he with the Fox West Coast Agency Corporation?

(Testimony of John B. Bertero.)

A. He is the president of that corporation.

Q. And that corporation hired the manager down there at the United Artists Theatre on Broadway?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion and opinion of the witness and is ambiguous. Does counsel mean a manager who was the servant of Fox West Coast Agency Corporation and paid by it, or a servant of the Fox West Coast Theatres Corporation?

The Court: If he can, he may answer the question.

The Witness: May I have the question?

Q. By the Court: Well, to simplify it, somebody had to run that United Artists Theatre; some individual had to run it?

A. Yes. [53]

Q. Who was that?

A. The managers and their appointments were made by Mr. Skouras.

Q. By Mr. Emme: And he was president of the Fox West Coast Agency Corporation?

A. That is right. He is also president of the Fox West Coast Theatres Corporation."

(Rep. Tr. pg. 102, line 12 to pg. 108, line 16).

In my capacity as assistant secretary of Fox West Coast Theatres Corporation I have knowledge of a certain entity referred to as the Fox U. A.

(Testimony of John B. Bertero.)

Venture. In reference to United Artists Theater on South Broadway, I knew, at the time I verified the answer in the federal court case to the amended complaint filed in the federal court, that all of the money taken in from the sale of tickets, in other words, the income from the conduct of the business of United Artists Theater at 933 South Broadway, went into a bank account kept separate and apart from any bank account of Fox West Coast Agency Corporation.

I knew that the payroll records of all of the persons from the manager of the theater on down to, we will say, the lowest employee in scale in that theater during the month of March, 1940, were kept in the name of Fox U. A. Venture.

“Fox U. A. Venture” was a bookkeeping title set up to economically describe the arrangement so far as accounting and other methods were concerned under Plaintiff’s Exhibit No. 5. The name “Fox U. A. Venture” refers only to United Artists Theatre Circuit, Inc. and Fox West Coast Theatres Corporation.

After the 5.25 percent of the gross income of the United Artists Theater at 933 South Broadway was deducted, and the payment of salaries of employees in that theater, including the manager of that theater, were deducted, the balance of that money went into a separate bank account, and ultimately what

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we call distributions of the Venture were distrib-

(Testimony of John B. Bertero.)

uted to the two parties to the Venture; that is, the Fox West Coast Theatres Corporation and the United Artists Theatre Circuit, Inc.

I was never present at any time when Mr. Skouras employed or made arrangements to have any person work at the United Artists Theater in Los Angeles; by that I mean any janitor or any usher or any manager or assistant manager of that Fox U. A. Venture.

I obtained from the original records kept by the Fox U. A. Venture payrolls or duplicate originals of payrolls showing employees at the United Artists Theater at 933 South Broadway for the entire month of March, 1940. I think these documents are the originals; yes, they are the originals.

With reference to these documents just referred to the following proceedings occurred at the trial:

“Mr. Gallagher: Now, if your Honor please, we would like to offer these in evidence with the request that either typewritten copies or photostatic copies may be substituted for the originals, if counsel have no objection, because the accounting office wants these records returned.

Mr. Rountree: We have no objection to the substitution of copies, but we object to the offer on the ground it is incompetent, irrelevant and immaterial.

The Court: What is the purpose of the offer, Mr. Gallagher?

(Testimony of John B. Bertero.)

Mr. Gallagher: The purpose of the offer, if your Honor please, is this: The evidence will show that there were a number of persons employed in that theatre who were not in the employ of the Fox West Coast Agency Corporation. In other words, it is a link in proof showing that the manager of the theatre and an assistant manager, if there was one, and all of the ushers and janitors and porters and cashiers were employees of the Fox U. A. Venture, consisting of Fox West Coast Theatres Corporation and United Artists Theatre Cir-

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cuit, Inc., a corporation. It is also material for the purpose of showing that there were many persons in and about the theatre who were employees of Fox West Coast Theatres Corporation and United Artists Theatre Circuit, Inc., a corporation. It will show that those persons who were in the theatre, and who had actual physical contact with the equipment, were not employees and servants, or employees or servants, of Fox West Coast Agency Corporation, a corporation. The evidence is also material for the purpose of establishing, as a matter of law, that the doctrine of *res ipsa loquitur*, which the plaintiff states in her memorandum she relies upon, is not applicable and could not be applicable because of divided control and divided responsibility. By referring to the foregoing

(Testimony of John B. Bertero.)

specific matters, I don't mean to preclude the claim that the documents are admissible in evidence and are material and relevant and competent for proof of any fact or issue in the case to which they may be directed as probative evidence, and I offer them for any and all proper purposes, to be considered as evidence for any and all proper purposes under the law as the case and issues are made by the pleadings.

Mr. Rountree: I will add to my objection, if the Court please, the further ground that it is a self-serving declaration and hearsay, and does not prove the matters counsel says he seeks to prove thereby.

Mr. Gallagher: Well, matters kept of record are not self-serving declarations and are not hearsay.

Mr. Rountree: Also, it is an attempt to vary the terms of a written instrument.

Mr. Gallagher: That is not correct, your Honor, because the contract says the Fox West Coast Theatres shall employ the personnel of the theatre, not as agent, but as Fox West Coast Theatres, and under the California law in the Civil Code, when an agent employs a sub-agent, the agent is not the agent of the agent, but is the agent of the principal.

(Testimony of John B. Bertero.)

The Court: Is not the sole question here the question of whether there was negligence in the operation of this theatre described by the plaintiff on the part of the individual corporation who was operating the theatre at that time, and what was done with reference to what are called ushers, or whatever they call them, in that theatre?

(Argument of counsel.)

The Court: Going back to this payroll exhibit of some sixteen or seventeen pages, I don't believe that all of this is material. Now, we have part of the April employment, which was after the accident. I don't believe it makes any difference in this case what the defendants did after the accident, in May or June, 1940. I don't think it makes any difference what they did before. I think, if it is admissible at all for the purpose counsel stated, it should be limited to the day or, if more convenient, to the week in which the accident occurred. I don't think this plaintiff is bound by something that happened in April following the accident.

Mr. Gallagher: No; she is not, your Honor, and I am sorry if I handed to your Honor any of the payroll for April, but I do believe that all of March, 1940, would be material for the reason that the plaintiff has testified in this case that some part of the chair broke on the 24th day of March, 1940. Now, in argument they

(Testimony of John B. Bertero.)

might claim, 'While it is true that the defendant showed here that all of the employees of the theatre in the week of the accident were employees of Fox U. A. Venture, why didn't they bring in evidence to show who were the employees from the 1st of March? That is the time when we contend that inspection would have discovered the defect,' and that is why I want to show the entire month of March to and including the 24th day of March, and I will restrict the offer, if your Honor please, to those payrolls which have reference to the month of March, 1940, up to and including the 24th day of March, 1940. [57]

The Court: All right. They may be admitted.

Mr. Gallagher: May we segregate those later, your Honor, from the parts that come afterwards?

The Court: Yes.

(After a suspension of five minutes.)

Mr. Gallagher: They have now been separated so that they show from the 1st of March through the 24th, but it is necessary, in order to show the 24th of March, to carry through until the 28th of March, because the payrolls cover that week.

The Court: Very well.

The Clerk: That will be Defendants' Exhibit No. C.

(Testimony of John B. Bertero.)

Q. By Mr. Gallagher: Mr. Bertero, I show you copies of an employer's report of taxable wages paid to each employee for the quarter ending March 31, 1940, and ask you if that was taken from the records of Fox U. A. Venture kept in the regular course of business, showing a copy of the employer's report of taxable wages paid to each employee at the United Artists Theatre at 933 South Broadway, Los Angeles, California, as of March, 1940?

Mr. Rountree: We object to that on the ground it is incompetent, irrelevant and immaterial, no sufficient foundation laid.

The Court: Overruled.

A. Yes, sir.

The Clerk: That will be Defendants' Exhibit D.

Mr. Rountree: I am not sure I understand what was offered.

Mr. Gallagher: I offered copies of the social security tax returns in evidence.

Mr. Rountree: I object to them on the ground they are incompetent, irrelevant and immaterial and hearsay, and I point out that they are records of apparently some organization not a party to this litigation, and on the further ground there is no sufficient foundation laid.

(Testimony of John B. Bertero.)

The Court: Overruled.

Mr. Gallagher: Will your Honor bear with me while I confer with counsel?

The Court: Yes.

(Conference between counsel.)

Mr. Gallagher: That is all.

Redirect Examination

Q. By Mr. Rountree: Mr. Bertero, is this Fox U. A. Venture a corporation? A. No.

Q. As I understand it, it is a fictitious name set up for bookkeeping purposes to carry out the terms of the contract, Plaintiff's Exhibit No. 5.

Mr. Gallagher: Just a minute. That is objected to on the ground it is immaterial what counsel understands, and in the second place, it calls for an opinion and conclusion of the witness with reference to carrying out the terms and provisions of a contract.

The Court: That objection is good. It will be sustained, but he may explain just exactly what this thing is, and what relation it has.

Q. By Mr. Rountree: Can you tell us just what Fox U. A. Venture is?

A. Fox West Coast Theatres Corporation and United Artists Theatre Circuit, Inc., jointly are entitled to the proceeds from the operation of several theatres, including United Artists Theatre downtown, and books of account are kept for the two parties and expenses are paid

(Testimony of John B. Bertero.)

by the two parties out of a common fund, and they receive the residium or whatever is left from the operation of those theatres.

Q. Is that the same fund from which the Fox West Coast Agency obtains its money?

A. Its handling fee, or whatever you may call it, of 5.25 per cent which it receives, is ob-
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tained from the same fund, yes, sir.

Q. And all of the proceeds from the United Artists Theatre are put into this fund, is that right? A. Yes.

Q. And it was upon that fund that you, as assistant secretary of the Fox West Coast Agency Corporation, signed certain checks?

Mr. Gallagher: Just a minute. We object to that on the ground that it is two questions in one, to wit: As assistant secretary of the Fox West Coast Agency Corporation, and signing checks.

The Court: It is a double question. Sustained.

Q. By Mr. Rountree: You previously testified that you had signed checks upon some fund?

A. On the Venture; the Fox U. A. Venture bank accounts.

Q. Did you sign those as assistant secretary of the Fox West Coast Agency Corporation?

Mr. Gallagher: That is objected to on the

(Testimony of John B. Bertero.)

ground it calls for an opinion and conclusion of the witness. The best evidence of that is the authority at the bank to sign, and who gave him that.

Q. By the Court: How did you sign the checks?

A. The check has on it—I think Mr. Gallagher has one—it shows ‘Fox U. A. Venture, by’, and it provides for two signatures. I think there are four parties who could sign on one side of the check and four on the other side of the check, and I am one of the parties who signed.

Q. No designation except just the individual names?

A. If your Honor please, I don’t know whether you understood it as the Fox U. A. Venture being two parties.

Q. By Mr. Rountree: I hand you a check which has been handed to me by Mr. Gallagher, upon which is printed ‘United Artists Theatre’.

Mr. Gallagher: Contingent fund, is it not?

Mr. Rountree: Let me get through describing it, please.

Q. —drawn upon the North Spring Street Branch of the Bank of America, and drawn

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upon the United Artists Theatre, Contingent Fund. There are two signatures. Can you tell me those names?

(Testimony of John B. Bertero.)

A. The first one is Thomas D. Sorerio and the second one is Jordan Sergeant.

Q. Now, is it that United Artists Theatre contingent fund where the proceeds from the United Artists Theatre are deposited?

A. May I explain the mechanics of how the funds are handled?

Q. Well, first, let me get the record clear on this particular question.

A. Will you let me have the question?

(Question read by the reporter.)

A. The funds of the United Artists Theatre are deposited in that account, yes, sir.

Q. By Mr. Rountree: Do you have authority to draw upon that account?

A. Yes. I will qualify that. To the best of my recollection, I have. I have not signed checks on that account for a long time.

Q. By Mr. Gallagher: What was the answer?

A. I have not signed checks on that account for a long time, and I don't recall whether I have authority to sign on that account, but I believe I have.

Q. By Mr. Rountree: In what capacity did you sign checks upon that account?

Mr. Gallagher: That is objected to on the ground it calls for his conclusion and opinion. The check would be the best evidence of the apparent authority, if any, and it invades the province of the court, likewise it is an attempt

(Testimony of John B. Bertero.)

to vary the provisions of a contract by parol evidence.

The Court: I am inclined to sustain that.

Q. All money of United Artists Theatre is placed in this contingent fund? A. Yes.

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A. Yes.

Q. And the only way it can get out of that fund is by check? A. Yes, your Honor.

Q. And out of that fund the money is paid where?

A. Certain expenses are paid by the theatre manager. After paying certain local expenses, the balance remaining in the fund is transferred to an account entitled 'Fox U. A. Venture Fund' in the Washington and Vermont branch of the Bank of America. Certain other expenses are paid out of that account, and at certain periods distributions are made to the owners of that account, Fox West Coast Agency, Fox West Coast Theatres and United Artists Theatres Circuit, Inc.

Q. By Mr. Rountree: What about the Fox West Coast Agency?

The Court: He got that first. It got its share in the check for 5.25 per cent.

A. Yes, your Honor.

Q. By Mr. Rountree: Was there any written agreement that you know of designating what the Fox U. A. Venture was or should do?

(Testimony of John B. Bertero.)

A. I am afraid I don't follow you, Mr. Rountree.

Q. Well, was there any written agreement between the Fox West Coast Theatres Corporation and United Artists Theatre—is that United Artists Theatres Circuit, Inc.?

A. Yes.

Q. And the Fox West Coast Agency Corporation. Was there any written agreement whereby the Fox U. A. Venture was set up or created—

Mr. Gallagher: That is objected to on the same ground; it is ambiguous. Counsel started two or three questions and he has referred to Fox West Coast Agency, a corporation, as being connected with the Fox U. A. Venture, and the question, if answered, would make the record very ambiguous. It is compound.

Mr. Rountree: I will withdraw it and ask this:

Q. Do you know if there was a written agreement creating the Fox U. A. Venture?

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A. According to my best knowledge, that was created by Exhibit 5, here in evidence."

(Rep. Tr. pg. 113, line 7 to pg. 123, line 21).

It is stipulated by and between the parties that it would be impracticable to attempt to make a copy

of the payroll sheets and employer's report of taxable wages paid, received in evidence as Defendants' Exhibits C and D, because of the fact that a typewriter cannot duplicate the exact form or contents of said exhibits in the manner in which the contents of said exhibits are set forth therein and also that it would be impracticable to attempt to print the exhibits on the size paper used by printers in the printing of the record on appeal and it is therefore stipulated that the originals of the Defendants' Exhibits C and D be sent to the appellate court in lieu of copies and that the above entitled court may make such order therefor and for the safe keeping, transportation, and return thereof, as it deems proper, and that in preparing briefs in the Circuit Court of Appeals the parties may print in their briefs a narrative of the contents of said exhibits which they or either of them desire to call to the attention of the Circuit Court of Appeals.

It is also stipulated that it is impossible to reproduce by means of a typewriter or printed words Defendants' Exhibits F, G, H and I, said latter exhibits being portions of broken iron, testified by defendants' witnesses to have been part of the seat occupied by the plaintiff in the theater.

PLAINTIFF'S EXHIBIT 6

is as follows:

“In the Superior Court of the State of
California, in and for the County of

Los Angeles

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JEAN L. FORSYTHE,

Plaintiff

vs.

FOX WEST COAST AGENCY CORPORA-
TION, a corporation, John Doe Company,
a corporation, Richard Roe, Ltd. a corpo-
ration, John Doe and Jane Doe,

Defendants

COMPLAINT FOR DAMAGES FOR
PERSONAL INJURIES

Comes Now the plaintiff and for cause of
action against the above named defendants, and
each of them, alleges:

I.

That during all the times herein mentioned
the Fox West Coast Agency Corporation, has
been and now is a corporation duly organized
and existing under and by virtue of the laws
of the State of Delaware, duly licensed to do
business in the State of California, with its
principal place of business in the County of Los
Angeles, State of California.

II.

That the defendants John Doe Company, a corporation; Richard Roe, Ltd., a corporation, John Doe and Jane Doe are sued herein under fictitious names as their true names are unknown to plaintiff herein, and plaintiff asks permission upon ascertaining the true names of said defendants to insert their true names in lieu of said fictitious names.

III.

That during all the times herein mentioned, the defendants, John Doe Company and Richard Roe, Ltd. have been and now are corporations organized and existing under the laws of the State of California, with their principal place of business in the County of Los Angeles, State of California.

IV.

That the defendants, and each of them, operate and maintain a motion picture theater known as the United Artists Theater open for
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the general public to view motion pictures, said theater being located in the City of Los Angeles, County of Los Angeles, State of California.

V.

That plaintiff on or about the 24th day of March, 1940, paid an admission to the afore-

said theater located on South Broadway in the City of Los Angeles, County of Los Angeles, State of California, to view a motion picture offered by said defendants to the general public; that plaintiff was shown to a seat in said theater by an attendant and/or employee of the defendants herein; that due to the carelessness and negligence of the defendants, and each of them, and their employees, plaintiff upon sitting on said seat was violently precipitated to the floor of said theater, by reason of the broken condition of said seat and the collapsing thereof, all of which caused her great pain and severe shock to her nervous system, bruises, abrasions and contusions, and a severe strain and wrenching of her lower back, all of which was the direct and proximate result of the carelessness and negligence of the defendants aforesaid; that plaintiff is informed and believes that the above named injuries are permanent, all to her damage in the sum of Twenty Thousand Dollars (\$20,000.00).

VI.

That as a result of the injuries sustained by the plaintiff, as aforesaid, plaintiff was forced to incur doctors and physicians services in the reasonable sum of \$217.50; nurses hire in the sum of \$187.51; hospitalization and ambulance hire in the sum of \$165.97, medicines, medical supplies and supports in the sum of \$112.95, all to her damage in the sum of \$683.93.

That plaintiff will be forced to incur further expenses for treatment of said injuries and will ask leave of court to amend this complaint to include said further expenses incurred.

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VII.

That plaintiff at the time of said injury was employed and receiving compensation in the sum of \$135.00 per month, and that by reason of the injuries aforesaid, plaintiff was compelled to and did remain away from her work for a period of two months, all to her damage in the sum of \$270.00. That plaintiff is still unable to work at this time and for an indefinite time in the future, and will ask leave of this court to amend this complaint to include her damage for loss of wages.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of Twenty Thousand Dollars (\$20,000) general damages; for the sum of Nine Hundred Fifty-Three and 93/100 Dollars (\$953.93) special damages, and for a further sum as special damages to be ascertained at the time of trial, together with her costs of suit herein incurred, and for such other and further relief as to this court may seem meet and just.

ROSECRANS & EMME

By OTTO J. EMME

Attorney for plaintiff.

State of California,
County of Los Angeles—ss.

Jean L. Forsythe being by me first duly sworn, deposes and says: that she is the Plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of his (her) own knowledge, except as to the matters which are therein stated upon his (her) information or belief, and as to those matters that he believes it to be true.

JEAN FORSYTHE

Subscribed and sworn to before me this
day of May, 1940.

.....
Notary Public in and for the County of Los
Angeles, State of California." [66]

PLAINTIFF'S EXHIBIT No. 7

“In the Superior Court of the State of
California in and for the County
of Los Angeles

No. 452-891

JEAN L. FORSYTHE,

Plaintiff

vs.

FOX WEST COAST AGENCY CORPORA-
TION, a corporation, et al.,

Defendants

ANSWER

Comes now the defendant Fox West Coast Agency Corporation, a corporation, and answers plaintiff's complaint as follows:

I.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in paragraphs II, III, VI and VII of said complaint and placing its denial thereof upon said ground, denies said allegations and each thereof.

II.

Defendant denies each and every allegation contained in paragraph V of said complaint from and including the word 'that', line 20, page 2 to and including the figures '(\$20,000.00)', line 32, page 2 of said complaint.

III.

Defendant denies that plaintiff has been damaged in the sum of \$20,953.93 or in any other sum whatsoever or at all. [67]

As and for a First, Separate and Special Defense, defendant alleges that on or about the 24th day of March, 1940, the plaintiff so negligently, carelessly and recklessly conducted herself while in the United Artists Theatre in the City of Los Angeles, California, immediately prior to and at the time she seated herself in a certain seat in said theatre, that any injury or damage sustained by plaintiff was a proximate result of said negligence, carelessness and recklessness on her part.

As and for a Second, Separate and Special Defense, defendant is informed and believes and therefore alleges that the plaintiff, at all times mentioned in her complaint, was an excessively obese person and that the said plaintiff was fully aware of the fact that her weight exceeded by a very great number of pounds the weight of the average person and the said plaintiff, at all times knew or should have known that seats in theatres and places of public accommodation are designed for the purpose of accommodating persons of normal size and normal and near normal weight and the plaintiff knew, at all times, that no seat in any theatre was designed for the purpose of accommodating a person of the grossly exces-

sive weight and size as the plaintiff and with knowledge of all of the said facts, the plaintiff failed to use a certain seat in defendant's theatre in a manner commensurate with her excessive weight and excessive size and by reason thereof the plaintiff tore said seat apart and broke the same and the said plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for the accommodation of a person of the size and weight of the plaintiff. [68]

Wherefore, defendant prays that plaintiff take nothing by her said complaint and that defendant have judgment for its costs incurred and to be incurred herein.

LASHER B. GALLAGHER

Attorney for defendant Fox West Coast Agency Corporation, a corporation.

State of California,
County of Los Angeles—ss.

John B. Bertero, being by me first duly sworn, deposes and says: that he is the Assistant Secretary of Fox West Coast Agency Corporation, a corporation, one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own

knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN B. BERTERO

Subscribed and sworn to before me this 28th day of June, 1940

ANN FRIEDLUND

Notary Public in and for the County of Los Angeles, State of California." [69]

It is further stipulated that all defendants' exhibits, from and including Defendants' Exhibit E, were offered and received in evidence during the presentation of defendants' case and that Defendants' Exhibits C and D were offered and received during the presentation of plaintiff's case and that all of plaintiff's exhibits, excepting Plaintiff's Exhibit 8 were introduced in evidence during the presentation of plaintiff's case in chief.

It is further stipulated that exhibits which are not specifically referred to in this Statement of the Case are not material to a consideration of any point involved in this case on appeal.

Before proceeding to introduce evidence in its defense, the defendant Fox West Coast Agency Corporation moved to strike from the record all evidence which was received over the objections made at the time the evidence was offered, upon the same grounds as specified in the objections prior to the time the evidence was received.

With reference to the said motion, the following proceedings occurred:

“In making the motions, the defendants are not, and neither of them is, making a conjunctive motion, with the thought that each and every bit of evidence must be stricken or else none shall be stricken. Each motion relates to each specific piece of evidence which was received over objection, and I ask your Honor at this time whether the Court would prefer that we go back over each particular bit of evidence and make a specific motion to strike as to each, or whether your Honor has the record sufficiently in mind to pass upon a motion in the form in which I make it. I don’t want to burden the Court with recollection. I am merely trying to save time.

The Court: Whichever way counsel wishes to proceed.

Mr. Gallagher: All right. Then by reference to each objection made which was overruled, at this time I make a specific motion to strike

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the evidence which was received over such objection upon each and every ground stated in the objection before the evidence was received. I make that motion in behalf of the defendants jointly and severally.

The Court: Overruled.”

(Rep. Tr. pg. 125, lines 5 to 24).

Before proceeding to introduce any evidence in its defense the defendant Fox West Coast Agency Corporation made a motion for a dismissal of the action as follows:

“Mr. Gallagher: Now, at this time the defendants, and each of them, move the Court for a dismissal of the action on the ground that upon the facts and the law the plaintiff has shown no right to relief. That motion is made by reason of Rule 41 of the Rules of Civil Procedure.”

(Rep. Tr. pg. 125, line 25 to p. 126, line 3).

* * * * *

(The matter omitted has reference solely to the Fox West Coast Theatres Corporation).

“The defendant Fox West Coast Agency Corporation moves the Court for a dismissal of the action so far as it is concerned upon the ground that there is no proof of the existence of the relationship of business invitor and business invitee as between the plaintiff and the Fox West Coast Agency Corporation.

The defendant Fox West Coast Agency Corporation moves the Court for a dismissal upon the ground that there is no proof of any facts showing the existence of any duty owing by the Fox West Coast Agency Corporation to the plaintiff.

The defendant Fox West Coast Agency Corporation moves the Court for a dismissal as

to it upon the ground that there is no proof of the breach of any duty owed by the Fox West Coast Agency Corporation to the plaintiff.”

(Rep. Tr. Pg. 126, line 19 to pg. 127, line 6).

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* * * * *

(The matter omitted has reference solely to the Fox West Coast Theatres Corporation).

“Each of the defendants, jointly and severally, moves the Court for a dismissal of the action upon each ground as follows:

First: There is no evidence sufficient to establish any negligence on the part of the defendants, or either of them.

Second: There is no evidence sufficient to establish any actionable negligence on the part of the defendants, or either of them.

Third: There is no evidence to establish actionable negligence on the part of the defendant Fox West Coast Agency Corporation”.

* * * * *

(The matter omitted has reference solely to the Fox West Coast Theatres Corporation).

“Mr. Gallagher: Very well. Now, with reference to the Fox West Coast Agency Corporation, I call to the Court’s attention the rule of law pertaining to the obligation, if any, of one who has employed an agent in and about the conduct of the business of another.

(Argument of counsel.)

Mr. Gallagher: Now, the only way in which

the plaintiff can hope to prevail upon the Court not to dismiss the action so far as proof of negligence is concerned is by resort to the doctrine of *res ipsa loquitur* and the case is barren of any evidence which would justify or warrant the application of *res ipsa loquitur* for the following specific reasons:

First: There is no evidence proving or tending to prove exclusive control of the theatre in either defendant, particularly in Fox West Coast Agency Corporation, a corporation.

Second: There is no evidence in this case showing that when a person who is as big as

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the plaintiff was at the time of this accident sits in a chair, in whatever manner she sat in the chair, such chair will not break unless somebody has been guilty of negligence. By that I mean there is no general experience of mankind which would show that when a woman weighing 300 pounds sits in a chair in a theatre, which chair is narrower than her body is at the hips, that such chair will not collapse or break, in the absence of some negligence on the part of whichever defendant had the duty of maintaining the chair in a reasonably safe condition.

Therefore, I contend that the doctrine of *res ipsa loquitur* is inapplicable, and I respectfully submit the motions.

The Court: The motions will be denied.”
(Rep. Tr. pg. 127, line 11 to pg. 129, line 14).

HARRY L. WALLACE,

produced as a witness on behalf of the defendants, testified as follows:

My name is Harry L. Wallace; I have resided in Los Angeles about nineteen years. In the month of March, 1940, I was assistant manager in the United Artists Theater at 933 South Broadway, Los Angeles. The nature of my work was the duties that assistant managers in theaters perform. As part of my work I prepared the payroll records showing the employees at that theater. Defendants' Exhibit C was prepared by myself in rough copies and the rough copies were typed by the secretary there at the theater.

Those payroll records truly and correctly reflect the names of each and every person who worked in that theater during the month of March, 1940; this is the payroll complete and included the names of all persons who performed any work of any kind in that theater.

Arthur Roberts was the head janitor in the month of March, 1940. Paul Seman, Robert Arroyo and Vance Cudd were all full time janitors. Arthur Roberts was janitor and Carl Zeich; these men did

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janitor work. They come there after the show is over at night. They turn up the seats, sweep out the papers, do the necessary vacuum work, scrubbing and cleaning and mirror work, etc.; strictly janitor work.

(Testimony of Harry L. Wallace.)

Those seats would not come up without someone lifting them up; you have to push the seats up. That would be done by the janitors at that time twice a day; that is, 12:30 at night and at 5:45 during the day.

Prior to Easter Sunday, which occurred in March, 1940, there had been detailed inspection of the seats and other equipment in that theatre. The Picture, "Gone with the Wind" had been showing in that theatre since December 29th, 1939. Between December 29th, 1939 and March 24th, 1940 there had not been a shutdown; the house was operating at all times.

There had been an inspection of the equipment in general, that is, the seats and everything like that others in addition to the janitors between December 29th, 1939 and March 24th, 1940, daily. Those who made the daily inspection were myself and Mr. Corley, who was the floor man, and certain girls designated to certain sections in the theatre to inspect.

My inspection was merely walking through the rows and taking the hand and working the seat up and down. The purpose of my taking hold of the seat and working it up and down was to see if the seat was loose.

In addition to the inspections made by me and Mr. Corley and the janitors during the period mentioned the usherettes made inspections.

On March 24th, 1940, or prior to the time that

(Testimony of Harry L. Wallace.)

Miss Forsythe claims she was injured, I had not noticed anything wrong with the seats in the row that she was then occupying.

Miss Forsythe did not talk to me at all on March 24th, 1940. I did not see her at all. [74]

I recall the picture schedule. We had two shows during the day. We had a show starting at about 9:45 and running until 1:30; then another show starting about 1:45 and running until 5:45; and that is the time that the house empties; that is our break; no one in the house at all until 7:30, and the house would open again and start at 8:00 and run until 12:00. What I mean by a break is the end of the complete showing of the picture in the morning, and between that time and the time the picture is run for the second time that day.

During the period from the finish of the showing of the picture at the morning show and the starting of the showing of the picture in the afternoon, the theatre lights are full up inside; it is just as bright as can be.

Now, with reference to Easter Sunday in March, 1940, I was at the theatre that morning. The condition, with reference to whether the seats in the downstairs portion were or were not occupied during the morning show is that the house was completely full; as we call it, full check. When I say full check, that means not a seat in the theatre; it means the usherettes have filled every seat. I

(Testimony of Harry L. Wallace.)

mean there are no more vacant seats; no more people to come in; we stand them outside.

Ever seat in that theatre was occupied from about 9:45 A. M. until about 1:30 P. M. by persons who were viewing the picture, which was, "Gone with the Wind". From 9:45 to about 9:55 it would be filling up; there was a news reel. We open up the box office at 9:15 and we get a heavy fill then and then the news reel comes on and we get a fill there, and then we close down the doors and sell box office tickets for the next show. In other words, say our house would open at 9:15; we start at 9:45 with the news reel, and that gives us an additional fifteen minutes to fill up. "Gone with the Wind" started at 9:55 and from 9:55 until 1:30 all of the seats were filled on that morning. [75]

I had occasion to look at the seat which had been occupied by Miss Forsythe after some accident happened. That was about 7 o'clock, when I came back.

It is stipulated that photograph, Plaintiff's Exhibit No. 1, may be transmitted to the Clerk of the Circuit Court of Appeals with the same force and effect and for the same reasons which have heretofore been stated in stipulations with reference to other exhibits which it is impracticable to copy.

(Witness Wallace continuing):

"Q. Had you ever seen it when it had been broken? A. Yes, sir.

Q. Could you tell from an inspection of that

(Testimony of Harry L. Wallace.)

cast iron part whether the break was new or old? A. Yes, sir; I believe I could.

Q. What was the condition with reference to that break in that metal part?

Mr. Rountree: We object to that as calling for a conclusion of the witness and no proper foundation laid.

The Court: Sustained.

Mr. Gallagher: I would like to make an offer of proof. We offer to prove by the testimony of this witness that the only parts of the chair which were broken were metal parts and that those metal parts were cast iron, and that the breaks in the cast iron were fresh breaks, and I make that offer on the theory that any lay witness can testify whether a break in a piece of metal appears to be a fresh break or an old break.

Q. Mr. Wallace, did you have a social security record and card at the time we are referring to, the month of March, 1940?

A. Oh, yes, sir.

Q. Do you have that with you?

A. No; I have not.

Q. Do you know what happened to it? [76]

A. I know what happened to half of it. It was thrown away.

Q. Destroyed? A. Yes.

Q. Did you get a new one since then?

A. No. I had no need for it.

(Testimony of Harry L. Wallace.)

Q. Well, who paid you? That is, where did you get your salary?

A. Fox U. A. Ventures.

Q. That is the same entity that was referred to by Mr. Bertero when he was testifying here, the Fox U. A. Venture?

A. Yes, sir.

Q. Did you ever receive any salary from the Fox West Coast Agency Corporation?

Mr. Rountree: We object to that as calling for a conclusion of the witness.

The Court: He may just tell how he was paid and by what method and what checks.

Q. By Mr. Gallagher: Do that.

A. I received my check at a certain time in the week from the United Artists Theatre, and that is the only check I ever received as long as I worked at the United Artists Theatre.

Q. That is, you received checks which were signed 'United Artists Theatre, Contingent Fund, by——'

A. By the management.

Q. Two names?

A. Two signatures, Tom Sorerio and Jordan Sergeant.

Q. Did you sign any checks yourself?

A. No, sir.

Q. By the Court: Who employed you?

A. By the management; Tom Sorerio.

Q. The manager of what?

A. Of the United Artists Theatre. [77]

(Testimony of Harry L. Wallace.)

Cross Examination

Q. By Mr. Rountree: How many seats are there in the house downstairs? A. 1082.

Q. Do you personally inspect the 1082 seats every day? A. No, sir.

Q. Did you inspect any seats on Easter Sunday in 1940? A. Yes, sir.

Q. What seats did you inspect?

A. The center section, half of it.

Q. What is that?

A. Half of the center section.

Q. Which half? A. The lower half.

Q. How many seats would that include?

A. To break that down that way, I wouldn't know.

Q. How many rows would it be?

A. That would include about thirteen or fourteen rows.

Q. And you did not observe what the usherettes did in the way of inspection, did you?

A. No, sir.

Q. There was another assistant manager, I believe you said? A. No; I did not.

Q. You are the only assistant manager?

A. Yes; a manager and assistant.

Q. Did you observe what anyone else did with reference to inspection of the seats?

A. You mean while they were doing it?

Q. Yes. A. No.

(Testimony of Harry L. Wallace.)

Q. So you don't know whether they actually inspected them or not, do you? [78]

A. Oh, yes.

Q. That is, of your own knowledge?

A. Unless I walked around with every usherette. I could see them going through the motions of it while I was with them.

Q. Would they be in the same part of the theatre you were or in some other portion of the theatre?

A. No; we all inspected them at the same time.

Q. You say they walked through the aisles?

A. Going through the same motion I was going through, and I was inspecting the seats.

Q. Were you in the theatre on the afternoon of Easter Sunday in 1940?

A. The afternoon of Easter Sunday? No; I left at two o'clock.

Q. Do you have the pieces of the seat you found broken?

A. Personally, no, I have not.

Q. What did you do with them?

A. That I don't know. The manager took care of the parts of the seat after I turned them in to him.

Mr. Gallagher: I have sent for them. I know where they are.

Q. By Mr. Rountree: By the manager, I take it, you mean Mr. Sorerio?

(Testimony of Harry L. Wallace.)

A. Mr. Sorerio.

Mr. Rountree: That is all.

Redirect Examination

Q. By Mr. Gallagher: What row was this seat in, the one that was broken?

A. Thirteen rows from the front.

Q. Was that within the seats that you inspected that day?

A. I would have hit that row and one right back. [79]

Q. In other words, it was included in the seats that you inspected that morning?

A. It was included.

Q. Was that seat all right in the morning when you inspected it? A. Yes, sir.

Mr. Rountree: We object to that as calling for a conclusion of the witness.

The Court: Yes; and no foundation laid. The witness would have to testify that all these five hundred or one thousand seats that he knew of of his own knowledge he had personally inspected he had personally inspected this particular seat.

Q. By Mr. Gallagher: What did you do with reference to the seats that were within the section that you inspected that morning?

A. I made the normal inspection of the seats, which might have been 200 or 250 seats in that section that I checked.

(Testimony of Harry L. Wallace.)

Q. And you don't know whether you checked this particular seat or not?

A. I checked every seat. The procedure is walking through a row as you check. That is, the thirteen or fourteen rows as you go.

Q. And you touch the seat?

A. You touch the seat with your right hand going through and your left hand going through the other way; grab hold of the seat as firmly as you can, and if there is any looseness in the seat you can detect——

Mr. Rountree: I object to that as *c* conclusion. What he actually did, I do not object to.

Mr. Gallagher: What I am trying to find out is whether the witness took hold of each seat or each chair in that section, or whether he took hold of only a small portion of the chairs in that section, and I still don't understand what he did. Will you resume the witness

[80]

stand so we can find out definitely?

A. By the Court: Two rows at a time, as I understand it?

A. No; one row at a time.

Q. By Mr. Gallagher: You have testified that the seat in which the plaintiff was sitting at the time of the accident was within the portion which you inspected that morning?

A. That is correct.

(Testimony of Harry L. Wallace.)

Q. Now, getting to the next point; did you personally inspect the seat of each chair in that portion that morning? A. Yes, sir.

Q. Was there anything wrong that you could find with any seat in any chair in that section?

A. No, sir.

Q. Did they all appear to be tight to you?

A. They did.

Mr. Rountree: We object to that as calling for a conclusion of the witness and incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. By Mr. Gallagher: Now, if any seat had a cast iron connection which was broken asunder, would the seat still raise up and down?

A. No, sir.

Mr. Rountree: We object to that as calling for a conclusion of the witness.

The Court: Overruled.

The Witness: No, sir.

Q. By Mr. Gallagher: When you saw this seat after this accident happened, you have testified that some part of the metal shown in this picture had been ripped clear out of the seat portion itself? A. Yes, sir.

Q. Will you point out to his Honor what you refer to when you say the metal part was broken? [S1]

A. This part right here (indicating).

Q. That is the cantilever part?

(Testimony of Harry L. Wallace.)

A. That sets out under the wood part of the seat, and that is the part that hinges on the upright; this is the upright, and there is a hinge here. (Indicating). Those two parts were broken. It was snapped here (indicating).

Q. In other words, this piece of metal extends both in front of the hinge and in back of the hinge? A. That is right.

Q. And the under surface of the seat is fastened to the upper surface of this metal which shows here in the photograph?

A. That is right.

Q. And is the hinge located right at the place where you can see this little portion of a circle?

A. Yes. That is where the little circle is in the rib there.

Q. And you say that not only was the metal part of the fixture which shows in the picture broken, but a portion back of the hinge as well?

A. Yes.

Q. And when you say part of it was torn out of the wooden part of the seat, do you refer to this same piece of metal which acts as both a hinge and a support?

A. No; when this broke, it left the seat down.

Q. We are not trying to establish what happened when it broke.

A. You want to know what the seat looked like when I got there?

(Testimony of Harry L. Wallace.)

Q. Yes. Was the seat separated from the metal on the left hand side when you got there?

A. No. This portion was still on the seat (indicating). [82]

Q. Just the portion that sticks out in front of the upright in the seat in the picture?

A. That is right.

Q. But the back portion of that metal support—where was that?

A. Well, that was just laying separate.

Q. Was that screwed into the wooden seat originally? A. No.

Q. Well, what held the wooden seat onto this metal?

A. Screws. This hinge runs back, and this hinge here (indicating)—there is a double hinge.

Q. Will you take that open and continue the hinge on back, to get an outline of it, back as far as you think it goes, and show its shape?

A. Well, I would say something like that (indicating). This is the seat here; this is the seat (indicating).

Q. The seat continues on back, too?

A. Yes.

Q. Now, I will mark this portion X, that you drew as the rear portion of the support, and the hinge as X-1, and the seat cushion itself as X-2. Now, the screws, you say, which held the seat cushion and the wooden frame, which

(Testimony of Harry L. Wallace.)

is a part of the seat cushion, to this metal support and hinge, were in this portion marked X- and also in this front portion?

A. The front portion, yes.

Q. Well, we will mark the front portion of that hinge as X-3. Was the hinge or support broken on the other side of the chair, or just on one side?

A. Just on one side.

Mr. Gallagher: That is all.

Recross Examination

Q. By Mr. Rountree: Does not the portion which is marked X, the continuation of the steel base, in fact simply run along as a flat base underneath the seat? Do you understand what I mean?

[83]

A. Yes; it is a continuation of the front casting it sets on.

Q. Is it the same shape as that marked X-3?

A. No; it is just about like I drew it there.

Q. Well, calling your attention to the seat, apparently in the right back of the chair, which has been marked as X-1, X-2 and X-3, to which you have previously referred, I will ask you if that is not a picture which shows the whole support?

A. It is not a clear one, no. In fact, it is a very poor one. You may see what you are overlooking, if you will look close; the hinge still

(Testimony of Harry L. Wallace.)

runs back of the seat. You miss it in here (indicating). You see, this is a hat rack (indicating).

Q. I will ask you if this portion marked X-3 is not generally L-shaped? A. No; it is not.

Q. Counsel has handed me a picture, and I will ask you if the hinged brace shown in that picture is the same as was on the chair which you found broken?

A. It is a little different in construction. That is the right-hand side of the chair. The rights and lefts are a little different. You see the difference here (indicating). This is the left and this is the right. The right-hand side goes into the left on top. That gives you a good picture of the top.

Q. But in so far as the base of the support, which is actually against the wooden part of the seat, would they be the same?

A. Yes; about the same.

Q. Calling your attention to the light mark in the picture—— A. That is a screw.

Q. Is that a screw? A. That is a screw.

Q. Then would you say that there was or was not a screw on the portion of the brace

[84]

which you have marked X on Plaintiff's Exhibit No. 1?

A. Yes; there is a screw back of that hinge.

Mr. Rountree: Do you want to introduce

(Testimony of Harry L. Wallace.)

this as your exhibit or shall I introduce it as mine?

Mr. Gallagher: Either way. Go ahead.

Mr. Rountree: I ask that this photograph be introduced as the next exhibit in order.

The Clerk: Plaintiff's Exhibit No. 8.

Q. By Mr. Rountree: None of the seat shown in Plaintiff's Exhibit No. 8 is the particular seat that was broken on this Easter Sunday, or are you able to tell whether it is or is not?

A. I thought you were telling me it was not.

Q. No; I am asking you.

A. I was present when the picture was taken, and that is the seat.

Q. After it had been repaired?

A. Yes; after another hinge was put on.

Q. Was it a corresponding piece which you found separate and apart from the wooden part of the seat——

A. You are on the wrong hinge again, sir. This hinge was not broken. They are entirely different. This one was broke at the left side of the second seat (indicating).

Q. But the construction as between the left and right is entirely different?

A. Yes; it is different. You can see that in here (indicating). There is a little difference in structure. This is marked R (indicating) and

(Testimony of Harry L. Wallace.)

then it is marked different here, so you can get them up right.

Q. And on the back part of the brace, are they the same or different?

A. I think they are just about the same. That is, if you [85] are working from the hinge, and then three or four inches that extends back here, I imagine that is the same. It appears to be the same.

Q. Was that the three or four inches back of the hinge that you found separate and apart from the seat?

A. No. This is the part I found separate from the seat (indicating).

Q. By 'this part,' you refer to what? The hinge?

A. As I explained before, this is in two parts, as this picture shows. This is the left side here (indicating).

Mr. Rountree: I don't think the Court is getting that.

The Court: I think I understand it. I have sat in those seats.

Q. By Mr. Rountree: Do I understand the hinge broke?

A. Yes; the brace broke and the hinge broke; two different pieces.

Q. Your examination consisted of taking hold of that part of the seat when it was in an upright position?

(Testimony of Harry L. Wallace.)

A. Throwing it down and throwing it back up, and if there was any looseness, it would show up.

Mr. Rountree: I move to strike the last part of the answer as not responsive.

The Court: It may go out.”

(Rep. Tr. pg. 146, line 16 to pg. 160, line 26).

CONNIE MILLER,

produced as a witness on behalf of defendants, testified as follows:

I recall the day when the plaintiff had an accident at United Artists Theatre at 933 South Broadway, Los Angeles. At that time my name was Connie Mandel. My occupation at that time was usherette. I do not recall seeing Miss Forsythe, the plaintiff in this case, until she came up to me and reported the accident. [86] I saw the plaintiff in the theatre that day a little after 4 P.M. in the afternoon.

On that day I had on a particular uniform or dress; it was a pink hoop skirt; an old fashioned hoop skirt, somewhat resembling the gowns worn in the picture. All of the other usherettes were dressed somewhat similarly that day. That was Sunday and there was a girl on the mezzanine floor, a girl on the balcony and a girl on the main floor. I was working on the main floor.

ROBERT ARROYO,

produced as a witness on behalf of defendants, testified as follows:

I live at 2513 Trinity; I am thirty-one years old. On the 24th day of March, 1940, I was working at the United Artists Theatre at 933 South Broadway as a janitor. I knew the other janitors who worked in that theatre at that time. The same crew which was working on March 24th, 1940, had been working there for a long time before that and for a long time afterwards.

“Q. By Mr. Gallagher: What did you do when you were engaged in cleaning out the theatre and when people had gone away and the picture was not being shown any more?

A. Well, we started sweeping under the seats.

Q. How about the aisles of the theatre? Were they swept, or not?

A. They were vacuumed.

Q. How about the seats themselves? Was anything done with reference to cleaning them?

A. Yes.

Q. What?

A. They were being cleaned every night, under them.

The Court: Just what you did; not what somebody else did.

A. I did that, too.

The Court: Proceed. [87]

(Testimony of Robert Arroyo.)

Q. By Mr. Gallagher: In cleaning the seats and cleaning under the seats, did you take hold of any part of the seat? A. Yes.

Q. Would you tell the judge what you did in cleaning about the seats?

A. Well, if they were down we had to raise them up?

Q. Why?

A. Well, after we got through cleaning we had to raise the seats; that is, every seat individually.

Q. Every individual seat? A. Yes.

Q. Was there any work done in cleaning the seat itself? I mean by that, the surface of the seat, or the arms or backs of the seats.

A. No; we didn't have to do that.

Q. Were you familiar with the work done by the other janitors there in that building while you were working there?

A. They were doing the same work I was doing.

Q. All doing the same work?

A. All doing the same thing."

(Rep. Tr. pg. 175, line 22 to pg. 177, line 6).

In doing my work, if I discovered any seat was loose, we had to report to the manager or one of the men that fixes the seats there in the theatre. That was every-day routine. There are some of the men there that fix the seats.

GOUGH L. CHENEY,

produced as a witness on behalf of defendants, testified as follows:

“Q. By Mr. Gallagher: Mr. Cheney, what is your occupation?

A. Chemist and metallurgist.

Q. How long have you been engaged in that occupation? A. Since 1910.

Q. Have you had occasion to examine metal during that time [88] and during your practice as a metallurgist?

A. I have.

Q. You have in your possession certain pieces of cast iron? A. I have.

Mr. Gallagher: I will state to your Honor that we have testimony to establish that these pieces that were broken on this particular chair at the time of this accident are in the same condition except for age now as they were immediately after the accident, and that will be offered. I am calling Mr. Cheney out of order with that understanding.

Q. Mr. Cheney, when did you first see those pieces of cast iron, approximately?

A. About June, 1940.

Q. Did you have occasion to go to the theatre known as the United Artists Theatre at 933 South Broadway since you got these pieces of cast iron? A. Yes.

Q. And did you there examine the general construction of the seats in that theatre?

(Testimony of Gough L. Cheney.)

A. I did.

Q. I will show you Plaintiff's Exhibit No. 1 and ask you if that photograph represents the type and construction of the seats there. That is, so much of the type of construction as can be seen in the pictures.

A. It does.

Q. Does that picture also show the same kind of device as these pieces of cast iron represented before they had been broken? By that I mean, can you see, on any one of these pictures, a device used for the same purpose as this cast iron piece was used prior to the time of the accident? A. Yes, sir.

Q. Will you point out to his Honor what particular part is [89] similar?

A. The supporting arm here under the seat is similar to this portion here (indicating).

Q. When you say "supporting arm", do you mean the thing on Plaintiff's Exhibit No. 1 which is identified by various letters and figures, X-3, X-1, pointing to the device?

A. The arm is designated as X-3, in particular.

Q. Will you state to the Court whether or not you have an opinion with reference to when these breaks or fractures occurred in point of time or sequence? In other words, did they all occur at once, or did one occur first and then others?

(Testimony of Gough L. Cheney.)

A. From an examination of the fractured surfaces and the *the* specimens, it is my opinion that they occurred practically at the same moment. That is, instantaneously.

Q. Was there any defect in the metal itself which could possibly be discovered by any kind of an examination except a disintegration of the entire fixture or fitting?

A. I found no defect in the metal.

Q. From your examination of the seats in the theatre and these pieces, can you state to his Honor which of the portions of this fitting were the weight-bearing portions, so far as the cantilever effect was concerned?

A. The load was supported by these two surfaces, which fit into a corresponding groove in the frame of the seat, the load being carried by these two pieces, with a bolt holding them in place.

The Court: You had better get those parts numbered so they will be identified.

Mr. Gallagher: I would like to have these two parts just referred to by the witness received in evidence as Exhibits F and G, F being the largest portion and G being the smaller portion, and let the record show that the portion of the casting at the farthest end from the hinge, the smaller section, is the part that [90] was referred to as the weight-bearing portion.

Mr. Rountree: It is so stipulated.

(Testimony of Gough L. Cheney.)

The Clerk: Defendants' Exhibits F and G.

Q. By Mr. Gallagher: Mr. Cheney, from your examination of the seats themselves in the theatre, and your examination and inspection of the mechanical construction and design of the seats, do you have any opinion with reference to what caused the fracture of the pieces marked F and G?

A. My opinion is they were subjected to a load greater than the cross section of the metal would withstand.

Q. Is a piece of metal subjected to a load both by lowering a weight into the seat, and also by impact? A. Yes, sir.

Q. In other words, might a load placed upon a seat in an unusual manner cause a greater strain or stress than the part was designed to hold?

Mr. Rountree: Just a minute. We object to that——

Mr. Gallagher: I will withdraw the question.

Q. Will you explain to his Honor in a little more detail how a part which is apparently sound might break even though the total weight which was involved was less than the total weight which that part would sustain under ordinary circumstances?

A. By sudden impact, or a moving weight, which would give it more foot pounds of en-

(Testimony of Gough L. Cheney.)

ergy, or by reducing the bearing surface on the cantilever, such as would occur by a side thrust, which would push the bearing surfaces away, or which would allow them to move and thereby change the direction of the applied force.

Q. When you say a side thrust, I would like to call your attention to this photograph again and ask you if those arms on those chairs, from your examination and in your opinion, are designed to do anything other than to separate the seat spaces and to provide arm rests? [91]

Mr. Rountree: Just a minute. I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Gallagher: I will withdraw the question.

Q. Mr. Cheney, assuming that a person whose body—that is, hips, were wider than the space between the insides of each arm would fit in such a seat, and assuming that such person would have to force his or her body into that space, have you an opinion with reference to whether or not that would create a side thrust within the general category of the meaning of that term as you have used it?

Mr. Rountree: Just a minute. I object to the question on the ground it is incompetent, irrelevant and immaterial, and no sufficient foundation laid for that type of hypothetical question.

(Testimony of Gough L. Cheney.)

The Court: I will let the witness answer.
Overruled.

A. Any side thrust applied to the arms of the chair would have a direct action on the cantilever bearing of the seat bracket.

Q. By Mr. Gallagher: Well, when you say it would have a direct action, what kind of direct action do you refer to?

A. It would throw stresses in there, and it would be hard to determine just what the ultimate effect would be, but the leverage action there would be rather great, as the design of that portion of the seat does not consider absorbing stresses in that direction.

Q. Have you had occasion to become familiar with seats used generally throughout this locality in motion picture theatres from your own personal experience with them?

Mr. Rountree: I will ask that that be answered yes or no.

Q. Yes; in a few instances.

Q. By Mr. Gallagher: Well, have you personally visited motion picture theatres as a patron yourself? A. Yes, sir.

Q. And in that capacity have you had occasion to observe the [92] general type of seats used in such places in this community, and the general construction of those seats?

A. I have in general, but I have never given the different ones any minute inspection

(Testimony of Gough L. Cheney.)

of any type, only in cases where there was some mechanical problem involved.

Q. Well, maybe you did not understand the point of my question. I will try to make it a little more plain. So far as general construction is concerned, and general design, is there any difference between the general construction and general design of the seats in the United Artists Theatre and those in other moving picture theatres throughout the city which you have visited as a patron?

A. Only that this is a typical cantilever type of seat. There may be other types in which the seat moves around on its own bearing, so that the weight is supported by the cantilever, which is away from the axis of the seat, but for this type, this is a common type of seat.

Q. In other words, with reference to the particular type or particular kind of seats used in the United Artists Downtown Theatre, those seats are in conformity with their type?

The Court: Just a minute. That is a leading question.

Mr. Gallagher: I will withdraw the question.

Q. Speaking particularly with reference to the seats in the United Artists Downtown Theatre, state whether or not those seats are in conformity, so far as design and construction is concerned, with cantilever seats?

(Testimony of Gough L. Cheney.)

Mr. Rountree: To which we object on the ground it is incompetent, irrelevant and immaterial.

The Court: I will permit him to answer.

A. It is a typical cantilever construction.

Mr. Gallagher: Now, if your Honor please, the other portions of the seat support which are here I would like to offer in evidence as Defendants' Exhibits H and I, the large part being H and the [93] small part being I.

Mr. Rountree: Are you offering them in evidence or for identification?

The Court: There is no testimony to identify them yet. We will mark them H and I for identification, H being the large and I being the small part.

A. By Mr. Gallagher: I hand you these two pieces of metal and ask you if, as they are fitted together, they were part of the metal mechanism on this seat which was fractured?

A. This particular one is typical of the construction of the of the seat that was fractured.

Q. Was that particular piece of metal, in your opinion, fractured? A. Yes, sir.

Q. Is there any indication of defective metal there?

A. No possible indication of any defect.

Q. In your opinion, did that fracture occur at a time different from the fracture of the other parts marked Defendants' Exhibits F and G?

(Testimony of Gough L. Cheney.)

A. In my opinion they occurred at the same time.

Q. Is this portion you have in your hand a part of the support on the left hand side of one of those seats in that theatre as the person sits in it and faces the screen?

A. Yes, sir.

Q. Have you attempted to fit these two parts together? That is, Defendants' Exhibits F and G and these which have been marked for identification as Defendants' Exhibits H and I?

A. Yes, sir.

Q. Do they fit together?

A. Yes, sir; they are parts of a unit.

Mr. Gallagher: Now, if Your Honor please, I would like to offer in evidence the portions which have been marked as Defendants' [94] Exhibits H and I for identification.

The Court: They may be received.

Mr. Gallagher: You may take the witness.

Cross Examination

Q. By Mr. Rountree: Can you tell me whether these two holes in the end of this piece which I show you, Exhibit H, were made for the purpose of inserting screws, for screws to go into the wooden part of the seat?

A. They appear to be, yes, sir.

Q. Would it have any effect upon the piece of metal—that is, as the seat is used—if one of those screws were missing?

(Testimony of Gough L. Cheney.)

A. May I ask you, do you assume that the load on the seat was placed normally on the seat?

Q. Well, if you can, answer the question generally, and if you want to modify it, you may do so.

A. If the load were placed uniformly on the surface of the seat, the fact that a screw was loose or missing, in my opinion, would not affect the strength of it.

Q. Will you tell me what you mean by uniformly? Does that mean the whole weight over the whole surface of the seat at the same moment?

A. No. A person sitting normally in a seat, so that the weight is supported more or less in the manner for which the seat was designed, rather than a person sitting on the edge of the seat, where they would get an improper action here (indicating), where a screw missing in the back might not offer the support.

Q. Well, if the principal screw were missing——

A. I don't believe that would have any effect.

Q. Do I understand you to say that you think all these fractures occurred at the same instant?

A. As close as anything could happen in sequence. Undoubtedly one particular part

(Testimony of Gough L. Cheney.)

broke first, followed immediately by the other.

[95] It may have been a fraction of a second.

Q. But one did occur first?

A. Undoubtedly.

Q. Have you any opinion as to which one occurred first?

A. It is my opinion that the fracturing here occurred first (indicating).

Q. By the Court: Which one is that?

A. The fracture on Exhibit F occurred first, because the fracture on Exhibit H—that portion only acted as a guide; it did not necessarily carry any load itself. In other words, something undoubtedly twisted the seat out of position in order to break the guide.

Q. By Mr. Rountree: Did you form any opinion as to the age of those seats when you were in the theatre? A. No, sir.

Q. Then, as I understand your testimony, it is your opinion that these fractures occurred in Defendants' Exhibits F and H because a greater weight was placed on the seat than it was designed to bear?

A. No, sir. My opinion is that a greater load was placed on the metal than the particular cross-section was able to withstand.

Q. Which cross-section do you refer to?

A. This bearing surface of this cantilever.

Q. Referring to Exhibit F?

A. Exhibit F, yes, sir."

(Rep. Tr. pg. 179, line 9 to pg. 189, line 24).

JAMES E. CORLEY,

produced as a witness on behalf of defendants, testified as follows:

“Q. By Mr. Gallagher: Mr. Corley, what is your occupation at the present time?

A. I am in the United States Army, sir.

Q. Stationed where? [96]

A. In the vicinity of Santa Rosa, north of San Francisco.

Q. In the month of March, 1940, were you employed at the United Artists Theatre at 933 South Broadway in Los Angeles?

A. Yes, sir.

Q. What was your occupation there?

A. I was listed as floor manager.

Q. On March 24, 1940, did you have occasion to examine a seat in row 14 at any time that day?

A. I examined a seat in row 13, sir, the second seat from the end.

Q. In row 13? A. Yes, sir.

Q. Was that a seat that had been involved in an accident concerning this lady here, Miss Forsythe? A. Yes, sir.

Q. What time did you see her first?

A. I could not say the exact minute, but it was sometime approximately about 4:15 or 4:30. In that period.

Q. Did you speak to her at that time?

A. Yes, sir; I did.

Q. Immediately after you spoke to her, or

(Testimony of James E. Corley.)

very shortly after you spoke to her, did you go down and examine the seat?

A. Yes, sir; I did.

Q. I will show you Defendants' Exhibits F, G, H and I and ask you whether you have ever seen those pieces of metal before?

A. Yes, sir; I have.

Q. Where were they when you first observed them in their broken condition?

A. They were in the second seat from aisle 3 in row 13; aisle 3 from the center section.

Q. Was that on March 24, 1940?

A. Yes, sir; it was. [97]

Q. Are those pieces of metal, except for any changes which may have occurred along the fracture lines of the metal, in the same condition as they were when you saw them there in that theatre?

A. Yes, sir; they are.

Q. Will you state to the Court what you observed with reference to the condition of the particular seat that you have referred to when you examined it at that time?

A. Well, I went down to this particular row of seats, and the second seat in from the aisle was empty at that time. The usherette had reported to me, and as I went down this seat was empty and it was down, and the left side of it, as I put my hand on it, would give just a fraction; I mean it would go up and down just a

(Testimony of James E. Corley.)

little bit. That is the general condition I saw, and I could tell, by putting my hand under it there, that it was broken. That is, the left side of the second seat from the aisle; the left arm or brace, whichever you want to term that.

Q. Was there any part of the seat other than that piece of metal which was broken or out of order? A. No, sir.

Q. And when you say 'that metal' in answer to the last question, you refer to these Defendants' Exhibits F, G, H and I?

A. Yes, sir."

(Rep. Tr. pg. 190, line 9 to pg. 192, line 20).

VANCE CUDD,

produced as a witness on behalf of defendants, testified as follows:

"Q. By Mr. Gallagher: Mr. Cudd, in the month of March, 1940, were you working as a janitor at the United Artists Theatre at 933 South Broadway in Los Angeles?

A. I was.

Q. For how long before that time had you worked at that theatre? [98]

A. Oh, three or four months, I would say.

Q. Did you work there during the entire month of March, 1940? A. Yes.

(Testimony of Vance Cudd.)

Q. In doing your work as a janitor there, will you state to the Court, what, if anything, you personally did with reference to the seats in the rows within the area being cleaned by you each day?

A. Well, we just came in direct contact with them to clean out between the seats and underneath the seats. We raised the seats up and left them up for the next day.

Q. Was your contact with the seats such as to cause your hand to come in contact with any part of the seat?

A. We raised the seats with our hands.

Q. In doing that could you tell if the seat was loose?

Mr. Rountree: We object to that on the ground it calls for a conclusion of the witness and is incompetent, irrelevant and immaterial.

Mr. Gallagher: I will withdraw the question and lay a better foundation, if I can.

Q. In your work in the theatre before March, 1940, had you had occasion to raise and lower many seats, or just a few?

A. Every seat in the house.

Q. And in the course of your work, did you become familiar with the seats themselves?

A. Oh, yes.

Q. And from your experience in handling those seats, could you tell, by raising or lowering one, whether the seat was or was not loose?

A. Well, we looked for things like that.

(Testimony of Vance Cudd.)

X Q. Well, could you tell? A. Oh, yes.”

(Rep. Tr. Pg. 193, line 9 to pg. 194, line 21).

[99]

Paragraphs I, II and III of the amended complaint relate solely and exclusively to the organization and existence of the defendants Fox West Coast Agency Corporation, a corporation, Fox West Coast Theatres Corporation, a corporation, and United Artists Theatre Circuit, Inc., a corporation, the fact that said corporations were and each thereof was duly licensed to do business in the State of California and that the principal place of business of each was in the County of Los Angeles, State of California. There is no allegation in either paragraph I, or paragraph II, or paragraph III which alleges any actionable negligence or any negligence of any kind or character. The substance of each paragraph is merely the allegation of the name of each corporation, the fact that it was organized and existed pursuant to the laws of a State, other than the State of California, and that each was duly licensed to do business in the State of California, and that each, except, the Fox West Coast Theatres Corporation, had its principal place of business in the County of Los Angeles, State of California.

Paragraph IV of the amended complaint relates exclusively to the defendant Fox West Coast Theatres Corporation, a corporation.

Omitting the title of court and cause, and the preliminary recitals which do not contain any finding of fact or conclusion of law, the

FINDINGS OF FACT

in the case at bar are as follows:

“The Court finds:

I.

That the allegations of Paragraphs I, II and III of plaintiff’s amended complaint are true.

II.

That the allegations of Paragraph IV of plaintiff’s amended complaint are not true.

III.

That it is true that defendants, Fox West Coast Agency [100] Corporation, a corporation, Fox West Coast Theatres Corporation and United Artists Theatre Circuit, Inc., a corporation, now and at all times mentioned in plaintiff’s amended complaint, were engaged in the business of operating and maintaining a motion picture theater known as the United Artists Theater which provides motion pictures and entertainment for the general public to view the same at certain costs of admission, said theater being located on South Broadway between 9th and 10th Streets in the City of Los Angeles, County of Los Angeles, State of California.

IV.

That it is true that on or about the 24th day of March, 1940, plaintiff paid an admission to the defendant corporations to enter the aforesaid United Artists Theater to view a motion picture then and there being displayed by said defendants and that said defendants accepted said admission fee from said plaintiff; that said plaintiff thereafter entered the said theater; it is further true that after entering the said theater the plaintiff proceeded to a seat among those provided for the patrons of said theater; that it is true that at said time and place, due to the careless and negligent manner in which the defendants, and each of them, and their said employees maintained and operated the seats in said theater, when the plaintiff sat down on a seat in said theater to view said picture show, as aforesaid, the said seat collapsed causing plaintiff to be thrown violently to the side and down, causing severe shock to her nervous system, a severe sprain and wrenching of her lower back, to her great pain and suffering, all to her damage in the sum of \$1140.65.

V.

That it is true that the negligent and careless manner in which the said defendants and their employees and agents maintained and operated the seats in said theater was the immediate and proximate cause of the aforesaid injuries received by plaintiff. [101]

VI.

That it is true that as a result of said injuries sustained by plaintiff, as aforesaid, plaintiff was forced to incur doctors and physicians services in the reasonable sum of \$709.50, nurses hire in the reasonable sum of \$109.50; hospitalization in the reasonable sum of \$99.89; a brace in the reasonable sum of \$21.63 and drugs and medical supplies in the reasonable sum of \$25.00, all to her damage in the sum of \$965.52. That all of the aforesaid sums are the reasonable value of said items and were necessary to plaintiff to incur in the treatment of her said injuries.

VII.

That it is true that plaintiff at the time of said injury was employed and receiving compensation in the sum of \$94.90 per month, and that by reason of the injuries aforesaid that plaintiff was compelled to and did remain away from her work for a period of four months and four days, all to her damage in the sum of \$393.83.

VIII.

That all of the allegations set forth in the first affirmative defense of the defendant, Fox West Coast Theatres Corporation, are true.

IX.

That it is not true that on the 24th day of March, 1940, on the occasion of plaintiff enter-

ing the said United Artists Theater, as hereinbefore set out, that plaintiff negligently or carelessly failed to inspect or pay any attention to said seat or the condition thereof; it is further not true that the plaintiff negligently or carelessly failed to discover whether the same was or was not in a good and sufficient condition, or negligently or carelessly failed to ascertain or discover whether the same was or was not loose, or negligently or carelessly failed to make any test whatever of said seat; [102]

It is further not true that the plaintiff negligently or carelessly permitted her body to come in severe and unusual contact with the parts of said seat or negligently or carelessly caused the said seat to be subjected to an extraordinary or unusual strain and stress; It is further not true that plaintiff negligently or carelessly forced a portion of her body between the arms of said seat in a manner in which the said seat was not designed to be used or negligently or carelessly caused an extraordinary or unusual strain and stress on the arms of said seat to the sides thereof and away from each side of the plaintiff's body.

It is further not true that the plaintiff negligently or carelessly used the arms of said seat for a purpose for which they were not designed, or that plaintiff forced her body into the space existing between the arms of said seat, or that plaintiff exerted a great or unusual force sideways against each arm of said seat.

That it is true that plaintiff was a woman weighing approximately 285 pounds at the time of the said accident; that it is not true that plaintiff negligently or carelessly failed to take into consideration the fact that the seat was, and all of the seats in said theater, were designed to accommodate persons of average bulk and weight, nor is it true that the plaintiff negligently or carelessly failed to control her body, or forced her body into said seat;

That it is not true that the plaintiff spread, or strained, or misused the said seat;

That it is not true that the injuries sustained by plaintiff were the proximate result of any negligence or carelessness on her part whatsoever.

X.

That it is true, as hereinbefore found, that at the time of the said accident, plaintiff herein weighed approximately 285 pounds; that it is not true that the plaintiff knew or should have known [103] that seats in theaters or places of public accommodation are designed for the purpose of accommodating persons of normal size and normal or near normal weight; it is further not true that the plaintiff knew at all times that no seat in any theater was designed for the purpose of accommodating a person of grossly excessive weight, or a person of the size and weight of the plaintiff.

It is further not true that the plaintiff failed to use a certain seat in the United Artists

Theater in a manner commensurate with her weight and size, or that plaintiff by reason of her excessive weight and size tore said seat apart and broke the same.

It is further not true that plaintiff assumed any and all risk of injury which might ensue by reason of her failure to make proper allowance for the fact that she was using a seat which was not and could not have been designed for persons of the size and weight of plaintiff.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court concludes:

I.

That this action is barred by the provisions of subdivision 3 of Section 340 of the Code of Civil Procedure of the State of California as to the defendant, Fox West Coast Theatres Corporation, a corporation.

II.

That the United States District Court, Southern District of California, did not obtain or have jurisdiction of the defendant, Fox West Coast Theaters Corporation, a corporation, or of the subject matter of this action, insofar as the defendant, Fox West Coast Theaters Corporation, a corporation is concerned.

III.

That plaintiff should have and recover judgment in the total sum of \$2500.00 against the

defendant, Fox West Coast Agency, a corporation, together with her costs of suit.

Let judgment be entered accordingly. [104]

Dated: March 12th, 1942.

J. F. T. O'CONNOR

Judge."

Omitting the title of court and cause and the preliminary recitals with reference to the filing of the written findings of fact and conclusions of law, the

JUDGMENT

appealed from is as follows:

"Now, Therefore, It Is Ordered. Adjudged and Decreed that plaintiff have and recover judgment against the defendant, Fox West Coast Agency, a corporation, in the sum of \$2500.00 together with her costs of suit taxed at \$87.63.

Done in open court this 12th day of March, 1942.

J. F. T. O'CONNOR

Judge."

Notice of entry of judgment in favor of plaintiff and against the defendant Fox West Coast Agency Corporation, a corporation, was served upon said defendant on the 24th day of March, 1942, said judgment having actually been entered on the 12th day of March, 1942.

Within the time allowed by law, the defendant

Fox West Coast Agency Corporation, a corporation, filed a motion for a new trial. Said motion for a new trial was orally presented and argued on the 20th day of April, 1942 and notice of ruling on said motion for a new trial, denying the same, was served upon the defendant Fox West Coast Agency Corporation, a corporation, on the 28th day of April, 1942.

The defendant Fox West Coast Agency Corporation, a corporation, within the time allowed by law filed a Notice of Appeal, and a copy of said Notice of Appeal was, within the time allowed by law, served upon counsel for the plaintiff, Jean L. Forsythe. A copy of [105] said Notice of Appeal is as follows:

“In the District Court of the United States
Southern District of California
Central Division

No. 1649 (BH) O’C

JEAN L. FORSYTHE,

Plaintiff,

vs.

FOX WEST COAST AGENCY CORPORATION,
a corporation, et al.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Fox West Coast Agency Corporation, a corporation, hereby appeals to the United States Circuit Court of Ap-

peals for the Ninth Circuit, from the final judgment entered in this action on the 12th day of March, 1942.

Dated: May 20th, 1942.

LASHER B. GALLAGHER

Attorney for Appellant Fox
West Coast Agency Corporation,
a corporation.

Address: 458 South Spring St.,
Los Angeles, California."

The foregoing Notice of Appeal was filed on the 20th day of May, 1942. [106]

THE STATEMENT OF THE POINTS RELIED
ON BY APPELLANT

is as follows:

I.

There is no evidence showing that there was any relationship between the plaintiff and the defendant Fox West Coast Agency Corporation, a corporation, excepting that they were strangers to each other and occupied that relationship which one member of the public bears to another member of the public.

II.

There is no evidence supporting the finding that the plaintiff was an invitee of the defendant Fox West Coast Agency Corporation, a corporation.

III.

There is no evidence showing that the Fox West Coast Agency Corporation, a corporation, violated

or breached any duty which it owed to the plaintiff Jean L. Forsythe.

IV.

There is no evidence showing any actionable negligence on the part of the defendant Fox West Coast Agency Corporation, a corporation.

V.

The Court erred in failing to find that the plaintiff did not sustain any injury as a proximate result of any breach of duty or negligence on the part of the defendant Fox West Coast Agency Corporation, a corporation.

VI.

There is no evidence showing that any servant, agent or employee of the defendant Fox West Coast Agency Corporation, a corporation, was guilty of any negligence whatever or did any act or omitted the doing of any act which proximately or at all caused or contributed to any injuries sustained by the plaintiff. [107]

VII.

The trial Court erred in failing to find that the plaintiff was guilty of negligence which was a proximate cause of her injuries.

VIII.

The trial Court erred in failing to find that the plaintiff assumed the risk of injury.

IX.

The conclusion of law that plaintiff should have and recover judgment in the sum of \$2500 against

the defendant Fox West Coast Agency Corporation, a corporation, together with her costs of suit is not supported or sustained by the findings with reference to the first affirmative and second affirmative defenses of the defendant Fox West Coast Agency Corporation, a corporation, in that said findings are in the form of negatives pregnant, are conflicting and contradictory, and actually are favorable to the appellant Fox West Coast Agency Corporation, a corporation, and on the facts actually found, in favor of the allegations of the said special defenses and each of them, the trial Court should have concluded that the plaintiff was not entitled to recover any sum whatsoever and that the defendant Fox West Coast Agency Corporation, a corporation, was entitled to judgment for its costs of suit.

X.

The Court erred in admitting in evidence, pursuant to plaintiff's offer thereof, the complaint of plaintiff and the answer of Fox West Coast Agency Corporation, a corporation, in a prior action filed in the Superior Court of the State of California, in and for the County of Los Angeles.

XI.

The Court erred in admitting in evidence conversations between one of plaintiff's witnesses and an officer of appellant, there being no evidence proving or tending to prove that any of such conversation was part of the *res gestae* or within the course or [108] scope of the agency of the said witness.

XII.

The Court erred in admitting in evidence the opinions and conclusions of the witness John B. Bertero.

XIII.

The Court erred in admitting in evidence a contract to which plaintiff was not a party.

It Is Stipulated that the foregoing Statement of the Case conforms to the truth and contains all parts of the record necessary fully to present the questions raised by the appeal and that the same may be approved by the above entitled Court and shall then be certified to the appellate court as the Record on Appeal. By this stipulation, the plaintiff is not agreeing or conceding that any point to be relied on by the appellant on this appeal as stated hereinabove, is correct, but, excluding the Statement of the Points to be relied upon by the appellant, the foregoing Statement of the Case conforms to the truth.

Dated: June 2nd, 1942.

ROSECRANS & EMME and

BAYARD R. ROUNTREE

By BAYARD R. ROUNTREE

Attorneys for Plaintiff,

Jean L. Forsythe.

LASHER B. GALLAGHER

Attorney for Appellant, Fox
West Coast Agency Corpora-
tion, a Corporation.

The foregoing Statement of the Case conforms to the truth and is hereby approved and It Is Ordered that the foregoing Statement of the Case be certified to the appellate court as the Record on Appeal in the above entitled action.

Done in open Court this 3 day of June, 1942.

J. F. T. O'CONNOR

United States District Judge.

[109]

Received copy of the within Statement of the Case, etc., this 25th day of May, 1942.

ROSECRANS & EMME

E. M. F.

Attorneys for Plaintiff.

[Endorsed]: Filed June 3, 1942. [109a]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Occidental Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California, is held and firmly bound unto Jean L. Forsythe, in the above entitled suit in the penal sum of Thirty Five Hundred and No/100 Dollars (\$3500.00), to be paid to the said Jean L. Forsythe, her successors and as-

signs, which payment well and truly to be made the Occidental Indemnity Company, a corporation, binds itself, its successors and assigns, firmly by these presents.

Sealed with the corporate seal and dated this 19th day of May, 1942.

The condition of the above application is such that: [110]

Whereas, Fox West Coast Agency Corporation, a corporation, only, one of the defendants in the above entitled suit has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment in the sum of \$2500 and costs in the sum of \$87.63 entered on the 12th day of March, 1942, by the District Court of the United States, Southern District of California, Central Division, in the above entitled cause;

Now, Therefore, the condition of this bond is for the satisfaction of the judgment in full against Fox West Coast Agency Corporation, a corporation, only, together with costs, interest, and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of judgment and such costs, interest and damages as the appellate court may adjudge and award against Fox West Coast Agency Corporation, a corporation.

In Witness Whereof, the corporate seal of said surety is hereby affixed and attested to by its duly

authorized attorney-in-fact at Los Angeles, California, this 20th day of May, 1942.

(Seal) OCCIDENTAL INDEMNITY
COMPANY

By L. H. SCHWOBEDA
Attorney-in-Fact.

State of California

County of Los Angeles—ss:

On this 20th day of May, 1942, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. H. Schwobeda, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Occidental Indemnity Company and acknowledged to me that he subscribed the name of Occidental Indemnity Company thereto as principal, and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

(Seal) M. E. BEEETH

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 23, 1945.

Examined and recommended for approval as provided in Rule 13.

LASHER B. GALLAGHER

Attorney for defendant Fox
West Coast Agency Corpora-
tion, a corporation.

I hereby approve the foregoing bond this 20 day of May, 1942.

J. F. T. O'CONNOR

United States District Judge.

[Endorsed]: Filed May 20, 1942. [111]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111, inclusive, contain the original statement of the case pursuant to Rule 76 of the Rules of Civil Procedure and a full, true and correct copy of supersedeas bond on appeal, which together with the original defendant's exhibits C and D and Reporter's Transcript transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing

record amount to \$18.50, which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 17th day of June, A. D. 1942.

(Seal)

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE,

Deputy

[Endorsed]: No. 10169. United States Circuit Court of Appeals for the Ninth Circuit. Fox West Coast Agency Corporation, a corporation, Appellant, vs. Jean L. Forsythe, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 18, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10169

FOX WEST COAST AGENCY CORPORATION,
a corporation,

Appellant,

vs.

JEAN L. FORSYTHE,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON APPEAL.

I.

There is no evidence showing that there was any relationship between the appellee and the appellant Fox West Coast Agency Corporation, a corporation, excepting that they were strangers to each other and occupied that relationship which one member of the public bears to another member of the public.

II.

There is no evidence supporting the finding that the appellee was an invitee of the appellant Fox West Coast Agency Corporation, a corporation.

III.

There is no evidence showing that the Fox West Coast Agency Corporation, a corporation, violated or breached any duty which it owed to the appellee Jean L. Forsythe.

IV.

There is no evidence showing any actionable negligence on the part of the appellant Fox West Coast Agency Corporation, a corporation. X

V.

The Court erred in failing to find that the appellee did not sustain any injury as a proximate result of any breach of duty or negligence on the part of the appellant Fox West Coast Agency Corporation, a corporation.

VI.

There is no evidence showing that any servant, agent or employee of the appellant Fox West Coast Agency Corporation, a corporation, was guilty of any negligence whatever or did any act or omitted the doing of any act which proximately or at all caused or contributed to any injuries sustained by the appellee.

VII.

The trial Court erred in failing to find that the appellee was guilty of negligence which was a proximate cause of her injuries. X

VIII.

The trial Court erred in failing to find that the appellee assumed the risk of injury.

IX.

The conclusion of law that appellee should have and recover judgment in the sum of \$2500 against

the appellant Fox West Coast Agency Corporation, a corporation, together with her costs of suit is not supported or sustained by the findings with reference to the first affirmative and second affirmative defenses of the appellant Fox West Coast Agency Corporation, a corporation, in that said findings are in the form of negatives pregnant, are conflicting and contradictory, and actually are favorable to the appellant Fox West Coast Agency Corporation, a corporation, and on the facts actually found, in favor of the allegations of the said special defenses and each of them, the trial Court should have concluded that the appellee was not entitled to recover any sum whatsoever and that the appellant Fox West Coast Agency Corporation, a corporation, was entitled to judgment for its costs of suit.

X.

The Court erred in admitting in evidence, pursuant to appellee's offer thereof, the complaint of appellee and the answer of Fox West Coast Agency Corporation, a corporation, in a prior action filed in the Superior Court of the State of California, in and for the Company of Los Angeles.

XI.

The Court erred in admitting in evidence conversations between one of appellee's witnesses and an officer of appellant, there being no evidence proving or tending to prove that any of such conversation was part of the *res gestae* or within the course or scope of the agency of the said witness.

XII.

The Court erred in admitting in evidence the opinions and conclusions of the witness John B. Bertero.

XIII.

The Court erred in admitting in evidence a contract to which appellee was not a party.

Dated: Los Angeles, California, this 13th day of June, 1942.

LASHER B. GALLAGHER

Attorney for Appellant, Fox
West Coast Agency Corpora-
tion, a corporation.

Received copy of the within Statement of Points etc. this 15th day of June, 1942.

ROSECRANS & EMME

By J P M

Attorneys for Appellee.

[Endorsed]: Filed June 13, 1942. Paul P. O'Brien, Clerk.

